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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

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MORRIS L. THIGPEN, COMMISSIONER, ET AL.,
Petitioners,

vs.

WILLIE N. REDDIX
Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

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## QUESTIONS PRESENTED

A.

The Court of Appeals has misconstrued this Court's ruling in Enmund v. Florida.

B.

The Court of Appeals violated the mandate of 28 U.S.C. § 2254(d) by failing to accord State Appellate Court's findings of fact the required presumption of correctness.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## I. PREFACE

Petitioners pray that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the Fifth Circuit, viz., the panel decision dated March 26, 1984, and the denial of the Petition for Rehearing dated May 21, 1984.

## II. OPINIONS BELOW

Court of Appeals: The panel decision of the Court of Appeals is reported as Reddix v. Thigpen, 728 F.2d 705 (5th Cir. 1984). The per curiam opinion of the Court of Appeals denying panel rehearing is reported as Reddix v. Thigpen, 732 F.2d 494 (5th Cir. 1984).

District Court: The District Court opinion is reported as Reddix v. Thigpen, 554 F.Supp. 1212 (S.D. Miss. 1983).

State Court: Respondent's original conviction and sentence of death were reversed pursuant to Jackson v. State, 337 So.2d 1242 (Miss. 1976), in an unpublished opinion noted as Reddix v. State, 342 So.2d 1306 (Miss. 1977). The opinion of the Mississippi Supreme Court upholding the conviction and sentence as remand is reported as Reddix v. State, 381 So.2d 999 (Miss. 1980). Reddix's application for leave to file a petition for writ of error coram nobis was denied without opinion.

## III. JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered March 26, 1984. A timely petition for panel rehearing was denied May 21, 1984. The judgment of the Court

of Appeals was issued, as and for the mandate, on August 1, 1984. Our petition for certiorari has been filed within the time frame as enlarged by order of Justice Brennon. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, viz.,

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . .";

the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution as applied to the States through the Due Process Clause of

the Fourteenth Amendment; and 28 U.S.C. § 2254(a), viz.,

> . . . a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States."

## V. STATEMENT OF THE CASE

### A. Substantive Facts

The substantive facts of this case are fully set out in the opinion of the Mississippi Supreme Court affirming the conviction and sentence. See Appendix 4.

## B. Procedural History

On or about February 7, 1975, Willie N. Reddix, respondent, Larry Jones and John Durengo (J. D.) Reddix were indicted in the Circuit Court of the Second Judicial District of Harrison County, Mississippi, for the December 2, 1974, murder of Arthur Weinberger during the commission of the crime of robbery.

Severances were granted, and the various defendants were tried individually. [1]

On March 14, 1975, respondent was initially convicted and the mandatory death sentence in effect at the time was imposed. An appeal was taken to the Supreme Court of

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1 Capital murder charges were dismissed as to J. D. Reddix, and he was re-indicted as an accessory after-the-fact. He testified against both petitioner and Jones.

Mississippi and the conviction and the sentence were reversed and remanded in light of Jackson v. State, 337 So.2d 1242 (Miss. 1976). See: Reddix v. State, 342 So.2d 1306 (Miss. 1977).

On remand respondent was tried and convicted and then sentenced under Miss. Code Ann. §§ 99-19-101 and 99-19-103 (1977). An appeal was once again taken to the Mississippi Supreme Court where on February 13, 1980, respondent's conviction and sentence were affirmed. Reddix v. State, 381 So.2d 999 (Miss. 1980).

On or about August 14, 1980, respondent filed a Petition for Writ of Certiorari with this Court. On November 10, 1980, certiorari was denied. Reddix v. Mississippi, 449 U.S. 986 (1980).

On January 6, 1981, an application for leave to file a Petition for Writ of Error Coram Nobis, Petition for Writ of Error Coram

Nobis, and related motions were filed with the Supreme Court of the State of Mississippi. On February 18, 1981, the Court denied the respondent leave to proceed without opinion.

On March 27, 1981, Reddix filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Mississippi. On April 2, 1981, the Honorable William C. Keady, Chief Judge, entered a Stay of Execution and sua sponte transferred venue to the Southern District of Mississippi since the judgment and sentence were imposed in Harrison County. The issues were joined on May 1, 1981.

On February 26, 1982, respondent was granted leave to amend his Petition. At the same time the Court granted petitioner leave to take certain discovery and granted an evidentiary hearing. On or about March 8,

1982, the Amended Petition was filed, and on March 18, 1982, the issue was again joined.

Initially, this matter was set for an evidentiary hearing on September 13, 1982. At respondent's request, the matter was reset on October 18th. On October 8th, respondent filed a Motion for Partial Summary Judgment on the ground that there was no finding of intent. On October 11th, petitioner filed a Counter Motion for Summary Judgment on the questions of intent, of the two (2) confessions, of the arbitrary imposition of the death penalty, and of the discriminatory imposition of the death penalty. On that same date respondent filed a Motion for Allowance of Expert Witness Fees, and two (2) days later respondent filed a Motion to Compel Discovery. All of these motions were noticed for hearing October 15th. On October 14th, counsel for respondent again had a conflict in schedules for both the

motions and evidentiary hearing, and matters were rearranged in order that all motions could be heard on October 29th and the evidentiary hearing, if such was necessary, on November 22nd. On October 27, 1982, the final motion in this scenario, a Motion to Amend, was filed by the respondent.

On October 29, 1982, the Court granted petitioners' Cross-Motion for Summary Judgment and denied respondent's Motions for Allowance of Expert Witness Fees, to Compel Discovery, to Amend, and for Summary Judgment. Appropriate Findings of Fact and Conclusions of Law were entered on November 10, 1982, denying the writ.

On December 20, 1982, respondent filed a Notice of Appeal. Note should be made of the fact that said notice was not timely filed, and no extensions pursuant to Rule 4, F.R.A.P., had been granted.

On December 7, 1982, respondent filed a Motion for Reconsideration of Findings of Fact and Conclusions of Law pursuant to Rule 60(b), Fed. R. Civ. P., questioning the Court's findings and decision relative to (1) the required findings under Enmund v. Florida, ____ U.S. _____, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982); (2) the denial of petitioner's second Motion to Amend; (3) the Court's ruling concerning petitioner's claims of race discrimination; and (4) the denial of petitioner's Motion to Compel Discovery.

On January 7, 1983, oral argument was heard, and on January 24, 1983, the Court based on Enmund granted the writ vacating both the respondent's conviction and sentence. See: Reddix v. Thigpen, 554 F. Supp. 1212 (S.D. Miss. 1983).

Thereafter, petitioners filed a timely notice of appeal to the United States Court of

Appeals for the Fifth Circuit who on March 26, 1984, reversed the decision of the District Court concerning the grant of relief on the issue of guilt but affirmed the decision of the District Court concerning sentence. Reddix v. Thigpen, 728 F.2d 705 (5th Cir. 1984). A Petition for Rehearing was filed raising among other issues that the Court had failed to accord certain State court findings the presumption of correctness mandated by 28 U.S.C. § 2254, that the Court had misinterpreted this Court's ruling in Enmund and that there is a conflict between the Circuits concerning the interpretation of Enmund. On May 21, 1984, the Court entered a per curiam opinion denying the petition. Reddix v. Thigpen, 732 F.2d 494 (5th Cir. 1984).

## VI. REASONS FOR GRANTING THE WRIT

The petition sub judice will focus primarily on two areas of inquiry. First, is Enmund, conceptually speaking, a rule of substance or a rule of procedure? Second, did the Court of Appeals err in refusing to accord certain factual findings made by the Mississippi Supreme Court the presumption of correctness mandated by 28 U.S.C. § 2254(d)?

Within the parameters of the first line of inquiry, we note that there has been an obvious split between the circuits relative to the application of Enmund. From a review of the decisions in Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983), Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983); Henry v. Wainwright, 721 F.2d 990 (11th Cir. 1983), and Drake v. Francis, 727 F.2d 990 (11th Cir. 1984), it appears that the Eleventh Circuit has been construing Enmund as

a substantive question of legal sufficiency of the evidence. Whereas, the Fifth Circuit in the instant matter as well as Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982), Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982), and Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983), have interpreted Enmund as requiring the entry of some talismatic finding of one of the criterion before a sentence of death may be imposed.

Petitioners submit that in viewing the evidence in a light most favorable to the prosecution, that a rational jury could have found that respondent and Jones entered into a plan to rob and kill Mr. Weinberger, that respondent, unlike Enmund actually participated in the homicide, and that he either intended for Jones to kill the victim or at the least contemplated that lethal force would be used during the course of the commission of the robbery. Concomitantly, petitioners submit

that in this regard the Court of Appeals erred concluding that the Mississippi Supreme Court made no findings in this regard to which 28 U.S.C. § 2254(d) was applicable.

## VII. ARGUMENTS

### A.

### THE COURT OF APPEALS HAS MISCONSTRUED THIS COURT'S RULING IN ENMUND V. FLORIDA

On December 16, 1974, subsequent to his arrest on the instant charge respondent after being advised of his constitutional rights and signing a written waiver thereof gave a written statement concerning his complicity in the robbery/homicide of Arthur Weinberger on December 2, 1974. The confession, admitted into evidence at trial, was as follows:

> "I, Willie Reddix, was at my home on the 2nd of December, 1974, and Larry Jones was at my

home. Larry is also known as Catfish. J. D. Reddix was not there at this time. He did not know anything about the plan that Larry and I had in min.

When J. D. came home, we asked him to give us a ride uptown. He took us uptown and parked in the lot behind the place that used to be Bradley's Cleaners. Larry Jones and I got out of the car, but my brother, J. D. Reddix, did not get out of the car. This was about 10:45 a.m. Larry and I walked uptown for about five or ten minutes. Then I, Willie Reddix, went into Art's Levi Store, and I began to question the man about a coat. He showed me a couple of coats, and he had his back turned to the door. About this time, Larry Jones, came in the store. I kept talking to the man to keep him from seeing Larry. For about the next three seconds, Larry hit the man about three times with a Stilson wrench. Then I ran to the door to keep a watch-out. I had no idea that the man was dead. Larry drug the man into the office. We gathered all the goodies. Larry took shirts and pants and hats

and put them in a footlocker. I was at the door watching all the time. Larry said, 'I can't get the cash register open.' So I opended it for him. At this time I went in the office to see was Mr. Art dead, but he was still breathing, so I put his coat under his head, and then we left the scene. Larry carried the footlocker out of the store. Larry went to the left, on Croesus Street, and I went on Howard Avenue. I was carrying a black jacket in my hand which I had took from the store. We met back at the car. J. D. was still in the car. Larry put the footlocker in the backseat of the car and he sat in the backseat. I got into the front seat. I gave the jacket to J. D. and told him, 'Here is a jacket.' J. D. did not ask us where we had been or where we got the things from. The only thing he said was 'What you all got?' and I told him to just drive. We went home and parked the car in front of my house, and Larry took the footlocker into my house. When I opened the cash register, we both took the money out. I got about fifty dollars, and I got one

> silver dollar. After we got home, we laid low for the rest of the day. All J. D. got was the coat I gave him. We did not tell him what we had done. The gun was not used in the holdup that Larry had, just the Stilson wrench." [Emphasis added].
>
> (R. 713-15)

On February 7, 1975, an indictment was returned against Reddix, Larry Jones, and J. D. Reddix charging that on or about December 2, 1974, [the aforesaid individuals] . . . did unlawfully, wilfully and feloniously with malice aforethought, kill and murder one Arthur Weinberger, a human being, while engaged in the crime of robbery upon him, in violation of Section 97-3-19, Sub-Section (2)(e), of the Mississippi Code of 1972, as amended, . . .." (R. 5) [2]

---

[2] We observe that both the indictment and Instruction S-2 use the terms "unlawfully", "wilfully", "feloniously" and "with malice aforethought". The word "unlawfully" means "in violation of law," Gilbert

(Footnote 2 Continued)

v. State, 198 Miss. 175, 21 So.2d 914, 916 (1945), and connotes, in a homicide case, that the act was done without justification or excuse. "Wilfully" means "intentionally," i.e., not by accident or lawful excuse, and implies that an act is done "knowingly." Ousley v. State, 154 Miss. 451, 122 So. 731 (1929). "Feloniously" is a technical word of the law and means "done with the intent to commit a crime; of the grade or quality of a felony." uMartin v. State, 163 Miss. 454, 142 So. 15 (1932).

"Malice aforethought" is the single most important element of murder. Pendergraft v. State, 213 So.2d 560 (Miss. 1968) (citations on appeal and rehearing omitted). In Mississippi it is equivalent to "pre-meditated design", Dye v. State, 127 Miss. 492, 90 So. 180, 181 (1922), or "deliberate design" to kill or effect death. Hawthorne v. State, 58 Miss. 778 (1881). The Mississippi Supreme Court in more recent years has continued to adhere to this viewpoint. In Emily v. State, 191 So.2d 925, 926 (Miss. 1966), the Court commented upon the subject thusly:

(Footnote 2 Continued)

> The second assignment of error is that the trial court erred in granting to the state an instruction which used the words "deliberate design," rather than the statutory words, "premeditated design." "Deliberate" is a synonym for "premeditated." Webster, New International Dictionary (2d ed. 1955). This Court has said that "malice aforethought", "deliberate design", and "premeditated design" mean the same thing. Hawthorne v. State, 58 Miss. 778 (1881).

"Malice aforethought" or "deliberate design" indicate an actual intent to kill. Peterson v. State, 242 So.2d 420, 427 (Miss. 1970). It is essential to the existence of "malice aforethought" that there shall have been a design or intent to effect the death of the person killed. Ellis v. State, 108 Miss. 62, 68 So. 333 (1914).

In short, a finding of "malice aforethought", in the absence of finding justification or excuse, implies a deliberate design to effect death or, at the very least, an intent to inflict great bodily harm that might reasonably be calculated to result in death.

At the close of all of the evidence at the guilt phase, the Court in pertinent part instructed the jury as follows:

INSTRUCTION NO. S-1

The Court instructs the Jury that the killing of a human being without the authority of law by any means or in any manner shall be Capital Murder when done with any design to effect death by any person engaged in the commission of the crime of robbery. The Court therefore instructs the Jury that if you believe from the evidence in this case beyond a reasonable doubt, that the Defendant, Willie N. Reddix, in company with another person, in the Second Judicial District of Harrison County, Mississippi, on or about the time and date charged and testified about, went to Art's Levi's in Biloxi, Mississippi, and did then and there take the personal property of one Arthur Weinberger, to-wit: clothing and valuables from his business, and against his will by violence to his person, and did then and there rob the said Arthur Weinberger of said personal property, and while so engaged in this design, the said Willie N. Reddix, acting in concert with another, struck the said Arthur Weinberger and killed him with an instrument, to-wit: a wrench, with the formed purpose to effect his death and as a result of said blows to

the head, the said Arthur Weinberger died, and said murder was without justification or in necessary self-defense, then the Jury shall find the Defendant guilty of Capital Murder. [Emphasis added]

(R. 812)

* * *

INSTRUCTION NO. S-2

The Defendant, Willie N. Reddix, has been charged by an indictment with the crime of Capital Murder for having caused the death of Arthur Weinberger, while engaged in the commission of a Robbery upon his person.

If you find from the evidence in this case beyond a reasonable doubt that the Defendant, Willie N. Reddix, was engaged in the criminal act of Robbery and that during the commission of the said Robbery the Defendant acting in concert with another did unlawfully, wilfully, feloniously and of their malice aforethought kill and murder Arthur Weinberger, a living person, and that said killing was done not in necessary self-defense or otherwise justifiable, then you should find the accused guilty of Capital Murder. [Emphasis added]

(R. 813)

Instruction C.01 (R. 804-6) finally told the jury that they were "not to single out one

instruction alone as stating the law, but you must consider these instructions as a whole."

Before elaborating on these findings let us degress momentarily and examine the standards by which we are to be guided.

Enmund's petition for certiorari was granted, 454 U.S. 939, 70 L.Ed.2d 246, 102 S.Ct. 473 (1981), to consider the validity of the death penalty under the Eighth and Fourteenth Amendments "'for one who neither took life, attempted to take life, nor intended to take life.'" Enmund, supra, 73 L.Ed.2d at 1145. In summarizing its discussion of the subject, this Court stated:

> Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse

> the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion. [Emphasis added]
>
> 73 L.Ed.2d at 1154.

Factually speaking, Reddix's culpability was light years beyond that of Enmund. In summarizing the factual situation in Enmund this Court noted:

> As recounted above, the Florida Supreme Court held that the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape. This was enough under Florida law to make Enmund a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed. It was this irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We

> have concluded that imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments.
>
> 73 L.Ed.2d at 1145-46.

Conversely, in the present case the testimony overwhelmingly showed that Reddix and Jones had planned to rob and murder the victim, that Reddix was present, on the scene, and held the victim's attention while Jones crept up from behind and bludgeoned the victim to death.

Consequently, we do not have the scenario where the condemned a block away was merely an accessory to robbery but find instead one who is actually present and participating in the commission of the homicide.

In affirming the grant of habeas relief as it pertained to the sentencing phase the Fifth Circuit fashioned a per se procedural rule requiring that before a sentence of death could be imposed regardless of the circumstances that

the jury must make some talismatic finding of at least one of the Enmund criteria.

> The eighth amendment, then, allows the state to impose the death penalty only if it first proves that the defendant either participated directly in the killing or personally had an intent to commit murder. In the present case we cannot ascertain from the record whether the jury found that Reddix had a personal criminal intent to kill that allows him to be sentenced to die. This "level of uncertainty and unreliability [in] the fact-finding process . . . cannot be tolerated in a capital case." Beck v. Alabama, 447 U.S. 625, 643, 100 S.Ct. 2382, 2392, 65 L.Ed.2d 392 (1980); Clark v. Louisiana State Penitentiary, 694 F.2d 75, 78 (5th Cir. 1982). Consequently, we hold that the eighth amendment as interpreted by Enmund entitles Reddix to habeas

corpus relief and requires the state to resentence him consistent with constitutional standards.

728 F.2d 708. [3]

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[3] We note in particular the lower court's discussion concerning accomplice responsibility. In particular the Court dwelled at length on the decisions in Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982), and Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982), because the instructions given therein allowed the jury to impute intent from one co-defendant to another.

As we pointed out to the Court of Appeals here, while Instructions S-1 and S-2 do contain the innocuous phrase "in concert with another" there was absolutely no instruction given that told the jury that they could impute the intent of Jones to Reddix. To the contrary, read as a whole, Henderson v. Kibbe, 431 U.S.

There is an apparent conflict between the circuits on this point. For instance, instead of interpreting Enmund as a rule of procedure

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(Footnote 3 Continued)

145, 52 L.Ed.2d 203, 97 S.Ct. 1730 (1977), the jury was instructed that in order to return a verdict of guilty they must find that based on the mutual intent of the parties ("their malice aforethought") Mr. Weinberger was struck with a wrench for the purpose of effecting his death. Consequently, we submit that the Court of Appeals was clearly erroneous in its conclusion that the jury was allowed to infer Jones' intent to kill to Reddix.

the Eleventh Circuit has, capitalizing on the comments concerning proof in the conclusion of the opinion, reviewed Enmund claims much in the same manner as one would review a sufficiency of the evidence claim under Jackson v. Virginia, 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

In Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983), we find the following:

> In Enmund the defendant was convicted of murder under Florida law whereby an individual may be found guilty of first degree murder if he was present at the scene and actively aiding and abetting the commission of a felony, there a robbery or attempted robbery, during the course of which someone is killed, even though the individual neither took life nor possessed a premeditated design or intent to take life. The Florida Supreme Court held that, at the most, the evidence showed that Enmund drove the

get-away car for the persons who committed the robbery and the killing and concluded that, without regard to Enmund's intent to kill, the evidence was sufficient to allow the jury to convict and sentence Enmund to death as an aider and abetter in a robbery. The United States Supreme Court reversed, concluding that "[b]ecause the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken," 102 S.Ct. at 3379 (emphasis supplied), the death penalty was disproportionate to Enmund's crime.

The Court stated:

> The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims; for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," Lockett v. Ohio,

> 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (footnote omitted), which means that we must focus on "relevant facets of the character and record of an individual offender." Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

Id. at 3377 (emphasis in the original).

Turning its attention to the individual culpability of Enmund, the Court concluded that the record, as construed by the Florida Supreme Court, did not warrant a finding that Enmund himself killed, attempted to kill or had any intention of participating in or facilitating a murder. The court therefore held that "his culpability is plainly different from that of the robbers who killed" and that treating them alike in imposing the death penalty was impermissible under the Eighth Amendment. Id.

An examination of the record in this case, as construed by the Georgia Supreme Court, leads us to conclude that the individual culpability of appellant is significantly greater than the culpability of the defendant in Enmund. There is sufficient

evidence in the record to support a finding that Ross not only contemplated that lethal force might be employed during the robbery and hence possessed an intent to kill, but that he actually committed the murder himself. Ross was seen standing in the dining room armed with Stanford's .32 caliber pistol seconds before the shooting. Witnesses testified that two rounds from Meredith's shotgun were fired, followed immediately by a pistol shot. Meredith's body was found in the adjoining kitchen shot through the chest with a single bullet at close range. Ballistics tests later revealed that the bullet was fired from the same .32 caliber pistol seen in Ross' possession seconds before the shooting. Shortly thereafter Ross told his brother Theodore that he had shot a policeman and that the gun of his accomplice had misfired. He also told another witness that he thought he had killed a policeman. Ross v. State, 233 Ga. 361, 364, 211 S.E.2d 356, 358 (1974).

The record demonstrates that even though Ross was indicted and convicted on a felony murder charge the theory of the State's case was that Ross himself was the triggerman. The case is readily distinguishable from Enmund, where the evidence

> supported no more than an inference that at the time of the killing the defendant was seated in a get-away car at the side of the road waiting for the robbers to escape. Here there is sufficient evidence in the record to support a conclusion that Ross contemplated that life would be taken, intended to kill, and actually killed Lieutenant Meredith. Examining the individual culpability of the defendant, as did the Supreme Court in Enmund, we conclude that the punishment was not disproportionate in relation to Ross' participation in the crime. The holding of the district court on this issue is AFFIRMED.
>
> 716 F.2d at 1532-33.

Likewise, in Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983), we note that, like here, the prisoner argued that the imposition of the death penalty was unconstitutional because he possessed no purpose to cause the death of the victim. The Court held:

> Stanley's level of personal culpability is greater than Enmund's by at least an order of

magnitude. It was Stanley, himself, who was overheard long before the murder to say that after he and Thomas robbed the victim they would have to "get rid of him." His role was aptly described by the Supreme Court of Georgia as follows:

> [T]here was evidence showing that he was an active participant in the crimes: enticing the victim to the place of the robbery, handling the pistol, guarding the victim while Thomas moved the car, digging the victim's grave, and burying the victim while he was still alive and pleading for his life.

Stanley v. State, 241 S.E.2d at 180.

From our examinatyion of the record we agree with the district court that "a trier of the fact could conclude beyond a reasonable doubt that the Defendant had a clear intention to kidnap, rob and murder the victim." [Emphasis added]

697 F.2d at 973.

In Drake v. Francis, 727 F.2d 990 (11th Cir. 1984), the Court explicitly resolved the

Enmund claim by a review of the record and the inferences that could be drawn therefrom:

> Drake next maintains that the imposition of the death penalty is both disproportionate and excessive in violation of the eighth and fourteenth amendments, citing as authority Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In Enmund, the Supreme Court held that imposition of the death penalty for felony murder was unconstitutional where the record supported no more than the inference that the defendant was the driver of the getaway car. The Court condoned imposition of a death sentence for felony murder only in cases in which the defendant killed, attempted to kill or intended to kill.
>
> Drake argues that because the jury was instructed as to both felony murder and malice murder but returned only a general verdict of guilty, he cannot lawfully receive a death sentence under Enmund because the conviction may have been based merely on the jury's belief that he was an accomplice to a felony murder.

The district court held Enmund to be inapposite because the record here supports the inference that Drake was the actual murderer and not simply an accomplice as in Enmund. We believe this interpretation of Enmund to be correct.

The crime of felony murder may be applied in two different situations. First, it may be used to impute the crime of murder to a participant in the felony who took no part in the actual murder. This type of felony murder will be referred to as accomplice culpability. Second, a participant in the commission of the felony who lacked the requisite intent to murder but did take part in the actual killing may be convicted of murder. In this case, the intent to commit the felony is imputed to the murder so that a showing of malice becomes unnecessary. Because we are dealing here with this latter type of felony murder, the Enmund decision is not controlling.

Enmund disallows imposition of a death sentence on certain of those defendants convicted of murder under a pure accomplice involvement theory. Drake does not fall into that category. Instead, a review of the record reveals that the jury was

> presented with two conflicting stories at the trial: the state's position that Drake was the actual murderer, and Drake's protestations of pure innocence and ignorance of the crime until after the fact. No suggestion was made by either side nor could any inference be drawn from the record that Drake played any sort of minor accomplice role paralleling that in Enmund. The fact of Drake's conviction makes clear that the jurors believed Drake to have participated actively in the charged crimes. Therefore, Enmund's prohibition against the death penalty for minor participation in the crime affords no relief for Drake.
>
> 727 F.2d at 996.

See also: Green v. Zant, ____ F.2d ____ (11th Cir. No. 82-8773, op. dated July 30, 1984) (where the case was presented on question of malice murder, Enmund did not apply)

While it is abundantly clear that Enmund is simply an elaboration on what this Court deems proper in order to give a defendant "individualized" consideration during the

sentencing phase, a review of the seminal cases decided by this Court in recent years suggests that the talismatic finding mandated by the Court of Appeals is without support. Within this context we note that in Zant v. Stephens, ___ U.S. ____, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983), the Court discussed the concept of individualized consideration and tis function of narrowing the class of individuals upon whom the death penalty may be visited. The Court, however, made it abundantly clear that the narrowing function is not vested solely in the sentencing phase. Accord: Jurek v. Texas, 428 U.S. 262, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976) (aggravating factors consolidated with substantive offense) In short, this Court in so far as we have been able to ascertain has never held that an actual specific or written finding of aggravating circumstances is constitutionally mandated. Instead, the Court

appears to have limited its rulings to only require that a sentence of death be predicated on proof of an aggravating circumstance. Logically, one would then conclude that a specific or written finding under Enmund is not constitutionally mandated, the only requirement being that evidence supporting the Enmund criteria be introduced.

Likewise, we find support in the recent case of Pulley v. Harris, ____ U.S. ____, 79 L.Ed.2d 29 (1984), for the proposition that

while it is not constitutionally mandated there is nothing wrong with allowing the Mississippi Supreme Court while performing its statutory sentence review [4] to determine, based on a

---

[4] Miss. Code Ann. § 99-19-105 (cum. Supp. 1977) provides for the following:

> (1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the

(Footnote 4 Continued)

form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding ofg a statutory aggravating circumstance as enumerated in section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(Footnote 4 Continued)

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in tis decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence. [Emphasis added]

general verdict, whether the evidence in support of sentence, i.e., aggravating circumstances and Enmund criteria, was legally sufficient. See: Leatherwood v. State, 435 So.2d 645 (Miss. 1983); Williams v. State, 445 So.2d 798 (Miss. 1984). Cf., Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983); Moore v. Zant, 722 F.2d 640 (11th Cir. 1984).

In its opinion the Court of Appeals without equivocation held that there was sufficient evidence for a reasonable jury to conclude that Reddix had a personal criminal intent justifying imposition of death. 728 F.2d at 711. In reviewing the sentence herein, such a factual finding was made by the Mississippi Supreme Court. Inasmuch as Enmund was predicated on a finding of the Florida Supreme Court and not some talismatic finding

by the sentencing authority, we submit that the Fifth Circuit has misconstrued this Court's ruling in Enmund and that the criteria discussed therein have been met here. [5]

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[5] It is interesting to note that in Enmund this Court stated:

> As of October 1, 1981, there were 796 inmates under sentence of death for homicide. Of the 739 for whom sufficient data are available, only 41 did not participate in the fatal assault on the victim. Of the 40 among the 41 for whom sufficient information was available, only 16 were not physically present when the fatal assault was committed. These 16 prisoners included only 3, including petitioner, who were sentenced to die absent a finding that they hired or solicited someone

(Footnote 5 Continued)

> else to kill the victim or participated in a scheme designed to kill the victim.
>
> 458 U.S. at 785.

Insofar as petitioners have been able to ascertain there have been six reversals predicated on Enmund. See: Bell v. Watkins, supra; Clark v. Louisiana State Penitentiary, supra; Reddix v. Thigpen, supra; Jones v. Thigpen, 555 F. Supp. 870 (S.D. Miss. 1983); Sanders/Miller v. Logan, 710 F.2d 645 (10th Cir. 1983); Enmund v. Florida, supra. Consequently, someone must be interpreting Enmund wrong. Likewise, with the exception of Sanders/Miller, it also appears that all of the Enmund reversals have come from the Fifth Circuit and the State of Mississippi in particular. Consequently, if the Court's statistics are right, and we assume they are, the Fifth Circuit has granted the writ in a case in which it should not have. We submit that this is the case and that it should be reversed.

B.

## THE COURT OF APPEALS VIOLATED THE MANDATE OF 28 U.S.C. § 2254(d) BY FAILING TO ACCORD STATE APPELLATE COURT FINDINGS OF FACT THE REQUIRED PRESUMPTION OF CORRECTNESS

Substantively speaking, Section 2254(d) requires federal courts in habeas corpus proceedings to accord a presumption of correctness to state courts' findings of fact or explain why the presumption is not applicable in view of the factors listed in the statute. Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982). This presumption applies to factual determinations made by both state trial and appellate courts. Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). A federal court may not substitute its own judgment as to the credibility of witnesses for that of the state courts. Maggio v. Fulford, ____ U.S. ____, 103

S.Ct. 2261, 76 L.Ed.2d 794 (1983). The high measure of deference to which a state court's factual findings are entitled requires that a federal court, considering an application for habeas corpus, more than simply disagree with the state court before rejecting its factual determinations; instead, it must conclude that the state court's findings lacked even fair support in the record. Marshall v. Lonberger, ___ U.S. ____, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). Within this regard, a state court's determination of what a jury was permitted to find and in fact did find is presumptively correct unless rebutted. Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982); Wainwright v. Goode, ____ U.S. ____, 78 L.Ed.2d 187, 104 S.Ct. 378 (1984).

On direct appeal to the Mississippi Supreme Court Reddix as his eighth assignment of error claimed that "The Sentence of Death Is

Excessive and Disproportionate to the Penalty Imposed in Similar Cases, Considering Both the Crime and the Appellant." Appellant's Brief at 22. In particular, Reddix argued citing Justice White's concurring opinion in Lockett v. Ohio, 438 U.S. 586, 621-628, 57 L.Ed.2d 973, 1000-4, 98 S.Ct. 2954 (1978) "that to impose the death penalty without a finding that the Defendant possessed a purpose to cause the death of the victim is a violation of the Eighth Amendment to the U. S. Constitution." Appellant's Brief at 23.

The Mississippi Supreme Court rejected this argument noting at one point in the opinion while addressing the complaint that the trial court had failed to instruct the jury as a mitigating circumstance that respondent had no specific intent to kill that:

> Appellant maintains that there should have been spelled out as mitigating circumstances, for

> instance, that appellant had no specific intent to cause the death of the victim, but nobody said he did not, and the record shows he purposely diverted the victim's attention until his accomplice could deliver the fatal blows. He further argues that appellant was an accomplice whose participation was relatively minor, but this, too, is contrary to the proof which showed him on an equal footing with Jones in the crime. [Emphisis added]
>
> 381 So.2d at 1010.

Continuing, the Court noted that intent was not a necessary element under state law but then addressed the question of Reddix's intent:

> Appellant's eighth and final assignment is that the sentence of death is disproportionate to the penalty imposed in similar cases, considering both the crime and the appellant.
>
> It was not necessary that appellant have any design to effect the victim's death, while appellant was engaged to the commission of the crime of robbery. He and Jones, his accomplice, had a plan for and in what they were about. It is argued that the record does not

show what the plan was. The poet said that the best study of mankind is man, and Holy Writ says, "By their fruits ye shall know them." There is no showing in this record that anything unanticipated occurred, to throw them off balance or to change their course. Holding the victim's attention from Jones was as much a part of Jones' bludgeoning the victim as if appellant had physically restrained him while his head was being crushed.

In Culberson v. State, 379 So.2d 499 (Miss. 1979), this Court unanimous in its decision of guilt, said:

> Presently, we can say without doubt the appellant schemed and participated in the unlawful undertaking which resulted in death. The subjunctive nature of the intention to kill makes it no less deliberate and no less deserving of capital punishment than if it had been expressed, in our opinion. The felon who causes death in furthering his crime manifests a callous disregard for human life, because he subordinates the life of the innocent to his desire for gain, thereby inviting the outrage of a society understandably bent upon

> protecting itself from physical violence.
>
> * * *
>
> By mandate of the statute we have reviewed the following capital murder cases: Jones v. State, 381 So.2d 983 (Miss. 1980); (companion case to this one); Culberson v. State, 379 So.2d 499 (Miss. 1979); Gray v. State, 375 So.2d 994 (Miss. 1979); Jordan v. State, 365 So.2d 1198 (Miss. 1979); Voyles v. State, 362 So.2d 1236 (Miss. 1978); Price v. State, 362 So.2d 205 (Miss. 1978); Irving v. State, 361 So.2d 1360 (Miss. 1978); Washington v. State, 361 So.2d 61 (Miss. 1978); Bell v. State, 360 So.2d 1206 (Miss. 1978); Nealy v. State, 354 So.2d 78 (Miss. 1978); and Hill v. State, 339 So.2d 1382 (Miss. 1976). In these cases there is no death sentence of one not physically acting or assisting in the killing, as is the situation here. Neither is it true that there was one planned and executed in more deliberate fashion than the one now before us. [Emphasis added]
>
> 381 So.2d at 1012-13.

While the Court of Appeals agreed with the State that a factual finding on the Enmund

question by the Mississippi Supreme Court would be binding, the Court rejected the State's Sumner argument holding that the foregoing did not amount to a "specific finding that Reddix had a personal intent to kill." 732 F.2d at 495.

The Court's disposition is disingenious and overlooks substantial dispositive authority; and even assuming that no specific finding was made, it is implicit in the State court decision that the factual issue was resolved against the respondent. A similar situation was addressed by this Court in LaVallee v. Delle Rose, 410 U.S. 690, 35 L.Ed.2d 637, 93 S.Ct. 1203 (1973). There the Court dealt with a state court hearing in which the trial judge failed to make express findings as to the defendant's credibility. The Court held, relying on Townsend v. Sain, 373 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), that

because it was clear under the applicable federal law that the trial court would have granted the relief sought by the defendant had it believed the defendant's testimony. Consequently, its failure to grant relief was tantamount to an express finding against the credibility of the defendant.

Such reasoning inevitably leads to a similar conclusion here. While we do not in any fashion agree with the Court of Appeals that there was no factual finding on this point, we submit that at the very least there was an implicit finding that Reddix planned to and intended that Weinberger would be killed or certainly contemplated that lethal force would be utilized during the commission of the felony. Considering the actual ruling of the Mississippi Supreme Court in conjunction with the actual arguments advanced there can be no other conclusion.

Therefore, we request that certiorari

should be granted to review this question.

## CONCLUSION

For the foregoing reasons, the petitioners respectfully request the Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review its decision herein.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, William S. Boyd, III, a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Petition for Writ of Certiorari to the following:

Steven L. Winter, Esquire
Attorney at Law
99 Hudson Street
16th Floor
New York, New York 10013

and

Charles Ramberg, Esquire
Attorney at Law
Post Office Box 1428
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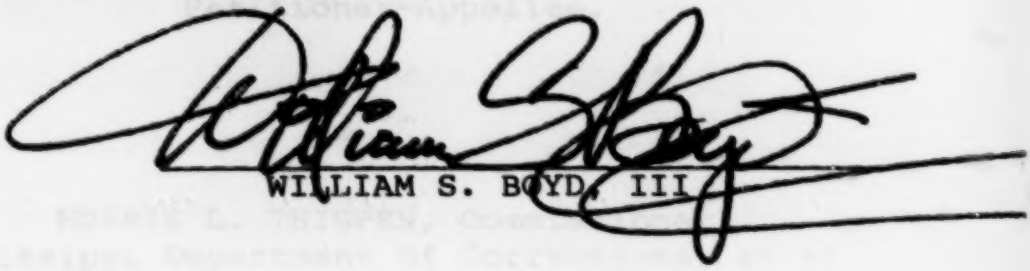
Attorneys for Respondent

This, the 10th day of September, 1984.



WILLIAM S. BOYD, III

WILLIE N. REDDIX
Petitioner-Appellee,

v.

MORRIS L. THIGPEN, Commissioner,
Mississippi Department of Corrections, et al.,
Respondents-Appellants

No. 83-4068

United States Court of Appeals,
Fifth Circuit

May 21, 1984

Petitioner, whose capital murder conviction and death sentence were affirmed by the Mississippi Supreme Court, 381 So.2d 999, sought writ of habeas corpus. United States District Court for the Southern District of Mississippi, William Harold Cox, J., 554 F.Supp. 1212, issued writ and state appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, 728 F.2d 705, affirmed in part, reversed

and remanded in part, and state filed petition for rehearing. The Court of Appeals held that state Supreme Court's finding on direct appeal from petitioner's capital murder conviction, to the effect that there was no showing in the record that anything unanticipated occurred to throw petitioner and his companion off balance ro to change their course did not supply a finding of petitioner's personal intent to kill so as to warrant imposition of death penalty.

PETITION FOR REHEARING DENIED.

Homicide 354

State Supreme Court's finding on direct appeal from petitioner's capital murder conviction, tio the effect that there was no showing in the record that anything unanticipated occurred to throw petitioner and his companion off balance or to change their

course did not supply a finding of petitioner's personal intent to kill so as to warrant imposition of death penalty.

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Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITIONS FOR REHEARING
(Opinion March 26, 1984, 5 Cir., 1984, 728 F.2d 705)

Before CLARK, Chief Judge, GARZA and JOLLY, Circuit Judges.

PER CURIAM:

In its petition for rehearing, the state essentially urges us to adopt a position we

already have adopted. We agree with the state that a felony murder conviction may support a death sentence. We also agree that the evidence in this case is sufficient to support a jury conclusion that Reddix had a person intent to kill.

What the panel opinion held, however, and a point with which the state takes issue, is that because the jury instructions might have led the jury to believe it could impute the intent of Reddix's accomplice, who actually committed the murder, to Reddix, we do not know whether the jury concluded that Reddix had the personal intent to kill necessary before the state may impose the death sentence. This holding is exactly what Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and our previous case of Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983) require. It is not, as the state argues, an

unnecessarily restrictive interpretation of Enmund.

The state also argues that we did not give due deference to the fact finding of the Mississippi Supreme Court as required by Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). The supreme court, however, made no specific finding that Reddix had a personal intent to kill. It said only, "'By their fruits ye shall know them.' There is no showing in this record that anything unanticipated occurred, to throw them off balance or to change their course." To the extent that this statement qualifies as a factual finding at all, we agree with the district court, 554 F.Supp. 1212 (D. Miss. 1983), that even under the deferential standard of Sumner, it does not supply the finding of personal intent required by Enmund.

Finally, we disagree with the state, Reddix v. State, 381 So.2d 999 (Miss. 1980), that our holding is inconsistent with that of the Eleventh Circuit in Drake v. Francis, 727 F.2d 990 (11th Cir. 1984). In Drake, the court said:

> The crime of felony murder may be applied in two different situations. First, it may be used to impute the crime of murder to a participant in the felony who took no part in the actual murder . . .. Second, a participant in the commission of the felony who lacked the requisite intent to murder but did take part in the actual killing may be convicted of murder. In this case, the intent to commit the felony is imputed to the murder so that a showing of malice becomes unnecessary. Because we are dealing here with this latter type of felony murder, the Enmund decision is not controlling.
>
> Id. at 997.

As is obvious from the plain wording of Drake, our opinion is in complete harmony with it. Unlike the situation in Drake, this is Drake's first type of felony murder case, in which the participant in the felony took no part in the actual murder and for whom a showing of personal intent is necessary under Enmund.

We have considered the arguments raised by the state in its petition for rehearing, and find each to be without merit. In a separate petition for rehearing, however, the petitioner requested that we correct a factual error to reflect that Reddix dictated, but did not himself write, his confession. We have made this correction, and it will appear in the final printed version of the opinion in this case.

The petitions for rehearing are DENIED.

WILLIE N. REDDIX
Petitioner-Appellee,

v.

MORRIS L. THIGPEN, Commissioner,
Mississippi Department of Corrections, et al.,
Respondents-Appellants

No. 83-4068

United States Court of Appeals,
Fifth Circuit

March 26, 1984

Petitioner, whose capital murder conviction and death sentence were affirmed by the Mississippi Supreme Court, 381 So.2d 999, sought writ of habeas corpus. United States District Court for the Southern District of Mississippi, William Harold Cox, J., 554 F.Supp. 1212, issued writ and state appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) because of improper instruction which may have led reasonable juror to conclude that codefendant's intent to murder store proprietor during robbery could be imputed to petitioner, it could not be determined whether evidence adduced at trial

was sufficient for reasonable jury to conclude that petitioner had personal criminal intent justifying imposition of death penalty and, hence, death sentence was infirm under the Eighth Amendment, and (2) evidence was nonetheless sufficient to sustain conviction of capital felony-murder.

Affirmed in part, reversed and remanded in part.

1. Criminal Law 1213.8(8)

Eighth Amendment allows the state to impose death penalty only if it first proves that defendant either participated directly in killing or personally had intent to commit murder. U.S.C.A. Const.Amend. 8.

2. Homicide 286(1)

When state law defines crime to include state of mind actively desiring that death or great bodily harm occur to another, the trial

court may not lighten the state's burden or dispense with that essential element of crime by converting crime into felony-murder.

3. Homicide 354

Because of improper instruction which may have led reasonable juror to conclude that codefendant's intent to murder store proprietor during robbery could be imputed to defendant, it could not be determined wheather evidence adduced at trial was sufficient for reasonable jury to conclude that defendant himself had personal criminal intent justifying imposition of the death penalty; hence, death sentence was inform under the Eighth Amendment. Miss. Code 1972, § 97-3-19; U.S.C.A. Const.Amend. 8.

4. Homicide 235

Evidence that defendant participated with codefendant in plan to rob store, deliberately attracted proprietor's attention so that codefendant could sneak behind him and strike

him with wrench, and observed each blow of assault and said or did nothing to stop codefendant was sufficient to sustain conviction of felony-murder, though it could not be determined from that evidence whether defendant had personal intent to kill so as to warrant capital penalty. Miss. Code 1972, § 97-3-19; U.S.C.A. Const.Amend. 8.

Appeal from the United States District Court for the Southern District of Mississippi.

Before CLARK, Chief Judge, GARZA and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

The State of Mississippi appeals the district court's order granting habeas corpus relief to Willie N. Reddix, who was sentenced to die by a jury sitting in Harrison County, Mississippi. The district court held that the state had not proved either that Reddix had the criminal intent necessary for the state to find him guilty of murder, or that Reddix had the personal intent to kill necessary for the state to impose the death penalty. We affirm the district court's holding regarding the death

sentence imposed against Reddix, and reverse its holding that the state had not proved criminal intent to commit the substantive offense.

I.

On the morning of December 2, 1974, Willie Reddix and Larry Jones had Willie's brother, J. D. Reddix, drive them to downtown Biloxi, Mississippi. J. D. parked the car and the other two proceeded down the block to Art's Levi Store. Pursuant to their plan, inside the store Willie Reddix attracted the attention of the proprietor, Arthur Weinberger, while Jones slipped up behind him and, as Reddix watched, brutally hit him over the head three or four times with a Stilson wrench, crushing his skull. Reddix and Jones robbed the cash register of its contents of about a hundred dollars plus some silver dollars, and stole several articles of clothing. They dragged the dying Weinberger into a small office away from the merchandise area of the store, placed the clothing in a foot locker, and with it fled the scene. A customer discovered Weinberger a few

minutes later and summoned the police. An ambulance took Weinberger to a hospital, where we died about five hours later without regaining consciousness.

In February of 1975 a grand jury in Harrison County, Mississippi, indicted Jones and the two Reddix brothers for the murder of Arthur Weinberger during the commission of the crime of robbery. The three were tried individually,[1] and on March 14, 1975, a jury convicted Willie Reddix of felony murder. The court imposed the mandatory death sentence in effect at that time. The Supreme Court of

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[1] A trial court convicted Jones, and the Mississippi Supreme Court upheld the conviction, noting that "[t]he proof . . . is undisputed" that Larry Jones wielded the wrench that killed Arthur Weinberger. Jones v. State, 381 So.2d 983, 987-88 (Miss. 1980). A federal district court, however, granted habeas relief to Jones because the jury did not find that Jones "killed, attempted to kill, or intended to kill . . .." Jones v. Thigpen, 555 F.Supp. 870, 878 (S.D. Miss. 1983). The state has appealed to this court. Jones v. Thigpen, Docket No. 83-4085.

Mississippi, however, reversed and remanded the cast pursuant to its decision in Jackson v. State, 337 So.2d 1242 (Miss. 1976). See Reddix v. State, 342 So.2d 1306 (Miss. 1977).

On remand, a jury again convicted Reddix of murder and again sentenced him to death. The Mississippi Supreme Court affirmed the conviction and sentence. Reddix v. State, 381 So.2d 999 (Miss. 1980). The United States Supreme Court denied Reddix's Petition for Writ of Certiorari, Reddix v. Mississippi, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980), and the Mississippi Supreme Court subsequently denied his Petition for Writ of Error Coram Nobis.

In March of 1981 Reddix filed a Petition for a Writ of Habeas Corpus in a United States district court pursuant to 28 U.S.C. § 2254. He presented several grounds for relief. The court granted Reddix leave to take discovery and granted an evidentiary hearing. The hearing, however, did not take place. Reddix filed a motion for partial summary judgment on the grounds that the jury had not found he had

his companion off balance or to change their the requisite criminal intent to commit the offense of murder or the personal intent that would justify imposing the death penalty against him. The state filed a counter motion for summary judgment on the intent question as well as Reddix's other claims.

In a lengthy opinion addressing all of Reddix's arguments, the district court denied Reddix's petition on November 10, 1982. On December 7, Reddix filed a Motion for Recomsideration of Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 60(b). The motion specifically raised the issues of the aborted evidentiary hearing, the state's failure to respond to discovery requests, and the propriety of disposing of Reddix's claims on a summary judgment motion. It also requested "such other and further relief as may be deemed proper." In this motion for reconsideration, Reddix specifically raised the issue of intent under Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

The district court responded to Reddix's Motion for Reconsideration by vacating its previous order in toto, 554 F.Supp. 1212. It granted Reddix habeas relief pursuant to Enmund, and also on the grounds that the record did not contain sufficient evidence to show that Reddix had the requisite criminal intent to commit the substantive offense of murder. The district court ordered Reddix to be set free because "he has been sufficiently punished for the crime of robbery which he committed on December 2, 1974."

Because of the faulty jury instruction given in this case, we are constrained to agree with the district court that Reddix's petition should be granted, pursuant to Enmund, as to the imposition of the death penalty. We disagree, however, with the district court's finding that the record does not contain evidence sufficient to convict Reddix of the substantive offense of murder, and with its

decision to free Reddix from confinement.

II.

A.

In Enmund v. Florida, the Supreme Court held that the eighth amendment does not permit imposing the death penalty against "one who neither took life, attempted to take life, nor intended to take life." 102 S.Ct. at 3371. A Florida court had sentenced Enmund to die for a murder committed during the course of a robbery for which he drove the getaway car. While acknowledging that the evidence was sufficient to make Enmund a principal for purposes of finding him guilty of the substantive capital felony offense, the Court held that imposition of the death penalty against him was excessive and contrary to the eighth and fourteenth amendments. Id. 102 S.Ct. at 3372. Enmund recognizes that the death penalty is unique in its severity and irrevocability; consequently, before the state may impose it, the state must focus on the personal intent and culpability of the defendant himself, and not merely that of an accomplice. Id. 102 S.Ct. at 3377. See

also Bell v. Watkins, 692 F.2d 1005 n. 9 (5th Cir. 1982) (discussing Mississippi Code § 97-3-19, the section under which Reddix was convicted).

[2] The eighth amendment, then, allows the state to impose the death penalty only if it first proves that the defendant either participated directly in the killing or personally had an intent to commit murder. In the present case we cannot ascertain from the record whether the jury found that Reddix had a personal criminal intent to kill that allows him to be sentenced to die. This "level of uncertainty and unreliability [in] the fact-finding process . . . cannot be tolerated in a capital case." Beck v. Alabama, 447 U.S. 625, 643, 100 S.Ct. 2382, 2392, 65 L.Ed.2d 392 (1980); Clark v. Louisiana State Penitentiary, 694 F.2d 75, 78 (5th Cir. 1982). Consequently, we hold that the eighth amendment as interpreted by Enmund entitles Reddix to habeas corpus relief and requires the state to resentence him consistent with constitutional standards.

The Mississippi statute under which Reddix was convicted defines capital murder as a killing done "with or without any design to effect death," by anyone engaged in the commission of certain crimes, one of which is robbery.[2] Pursuant to its capital murder statute, then, the state could convict someone engaged in the crime of robbery of the substantive offense of capital murder without finding he had a personal intent to kill. This

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[2] The Mississippi statute under which the jury convicted Reddix provides that:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> * * * * * *
>
> (e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, . . . or in any attempt to commit such felonies . . ..

Miss. Code Ann. § 97-3-19 (Supp. 1983) (also in effect in 1974).

conclusion flows from the clear import of the words "with or without design." The capital murder statute, however, does not require imposition of capital punishment,[3] and the eighth amendment, as interpreted by Enmund, is not implicated as long as the sentence imposed is not capital punishment. As this court recognized in Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983), Enmund does not affect the state's definition of any substantive offense, even a capital offense. The state may omit specific intent as an element of a capital crime without transgressing the eighth amendment, and, consequently, may convict an accused of that capital offense without requiring the jury to find personal intent to kill. Enmund, however, will "bar a death penalty upon jury instructions that permitted its imposition based solely upon a

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[3] Mississippi law provides for a separate sentencing proceeding in which the jury hears evidence on aggravating and mitigating circumstances to determine whether the death sentence is appropriate. See Miss. Code Ann. §§ 99-19-101-105 (Supp. 1983).

coconspirator's intent and act, and absent personal intent or contemplation of the accused that a killing take place." Id. at 847 (emphasis in original). Thus, Reddix's conviction of the substantive offense of murder is not infirm under the United States Constitution and can serve as no basis for habeas relief.

B.

At the close of the presentation of evidence in the guilt phase of Reddix's trial, the state trial court instructed the jury regarding the law in Mississippi of accomplice responsibility, which allows any participant in the crime during which the killing occurs to be liable as a principal. Bell v. Watkins, 692 F.2d 999, 1004 (5th Cir. 1982); Alexander v. State, 250 So.2d 629 (Miss. 1971). Specifically, the court said:

> The Court instructs the Jury that the killing of a human being without the authority of law by any means or in any manner shall be Capital Murder when done with any design to effect death by any person engaged in the commission of the crime of robbery. The Court

> therefore instructs the Jury that if you believe from the evidence in this case beyond a reasonable doubt, that the Defendant, Willie N. Reddix, in company with another person . . . did then and there rob the said Arthur Weinberger of said persona property, and while so engaged in this design, the said Willie N. Reddix, acting in concert with another, struck the said Arthur Weinberger and killed him with an instrumen, to-wit: a wrench, with the formed purpose to effect his death and as a result of said blows to the head, the said Arthur Weinberger died, and said murder was without justification or in necessary self-defense, the Jury shall find the Defendant guilty of Capital Murder. (Emphasis added.)

And further:

> If you find from the evidence in this case beyond a reasonable doubt that the Defendant, Willie N. Reddix, was engaged in the criminal act of Robbery and that during the commission of the said Robbery the Defendant acting in concert with another did unlawfully, wilfully, feloniously and of their malice aforethought kill and murder Arthur Weinberger, a liveing person, and that said killing was done not in necessary self-defense or otherwise justifiable, then you should find the accused guilty of Capital Murder. (Emphasis added.)

A reasonable juror carefully heeding these instructions fairly could conclude that

Jones's intent to commit murder may be imputed to Reddix. That imputation is exactly what Enmund and the eighth amendment prohibit in death penalty cases. Consequently, the death sentence is infirm under the United States Constitution and cannot stand.

Our holding in this case is consistent with prior decisions of this court. In Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982), we held that the jury instructions at the sentencing phase were unconstitutionally vague because they did not define or specify the aggravating or mitigating circumstances of the crime that the jury must consider in deciding whether to impose the death penalty. Id. at 1010-1011. Because we granted the petition on the grounds of vagueness, we did not reach the Enmund question, but noted however, that, Enmund might be implicated upon resentencing because the judge's instructions on capital murder and aiding and abetting left unclear whether the jury convicted the defendant because they concluded that he had in fact

pulled the trigger or solely because he was involved in the robbery. Id. at 1013.

[2] Similarly, in Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982), this court granted habeas relief to a petitioner because jury instructions substantially similar to those given at the guilt phase of Reddix's trial impermissibly shifted the burden of proof to the defendant in violation of Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) and Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 1450, 61 L.Ed.2d 39 (1979). Clark and his partner robbed a restaurant and, in the process, one or both of them shot the restaurant manager twice and stabbed him thirty times. The substantive law under which Clark was convicted, unlike Mississippi law, required the state to prove specific intent. Id. at 76-77. While acknowledging that the evidence was sufficient to prove that Clark committed robbery, and perhaps murder as well, this court held the jury insturctions to be fatally defective because they did not instruct the

jury to find "that a conspiracy to kill existed" or that abesent that conspiracy "they could not attribute the murderous act of one conspirator to the other." Id. at 76. Citing Enmund, the court noted that the instructions were contrary to the eighth amendment, but held they were unconstitutional under Sandstrom as well, so as to require granting habeas relief as to the substantive conviction. [4] Id. at 76-77.

[3] Conversely, we have refused to grant habeas relief when the petitioner argued that the jury had not found personal intent to kill if curative jury instructions given at the sentencing phase, or the manner in which the case was presented to the jury, clearly

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[4] As we said in denying rehearing:

> When . . . the state law defines the crime to include a state of mind actively desiring that death or great bodily harm ovvur to another, the trial court may not lighten the state's burden, or dispense with that essential element of the crime, by converting the crime into felony murder.

697 F.2d 699 at 700.

indicated that the jury necessarily concluded that the defendant had a personal intent to kill. In Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983), we held that instructions given at the sentencing hearing and the jury's response to special issues submitted to it left no doubt that the jury found Skillern had a personal intent to kill. Id. at 847-48. Similarly, in Jordan v. Watkins, 681 F.2d 1067 (5th Cir. 1982), a case involving only one pertetrator, the jury instructions made clear that felonious intent was a prerequisite to imposition of the death penalty. Because the crime had only one perpetrator, the intent found could not be anyone's but the defendant's. In Reddix's case, however, involving three perpetrators, nothing that transpired at trial and nothing in the instructions given at his sentencing hearing clarifies the confusion left by the jury

instructions given at the guilt phase of the trial.[5]

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[5] The instructions the court gave at the sentencing phase instructed the jury only on the law of aggravating and mitigating circumstances. Indeed, it is likely that they reinforced any confusion that the previous instructions may have created. In defining "aggravating circumstances," the court gave the following instruction:

> Was the offense committed while the Defendant was engaged in the commission of the crime of robbery, or in an attempt to commit robbery? Robbery is defined as the felonious taking of the personal property of another, in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person. If a person shall design and endeavor to commit an offense, and shall do any overt act toward the commission thereof, but shall fail therein, or shall be prevented from committing the same, then he would be guilty of any attempt to commit the offense.

And further:

> If you find from the evidence, beyond a reasonable doubt, that a capital offense was committed while the Defendant was engaged,

In reversing Reddix's death sentence, we do not hold that the evidence adduced at trial is insufficient for a reasonable jury to conclude that Reddix had a personal criminal intent justifying the imposition of the death penalty. We hold only that because of the jury instructions, we cannot ascertain what the jury actually concluded from the evidence. Consequently, the state is free to hold another hearing to resentence Reddix. If the jury concludes that Reddix personally had the intent to kill Arthur Weinberger, it may reimpose the death penalty. Jordan v. Watkins, 681 F.2d at 1083 (5th Cir. 1982).

III.

[4] The district court held that the record did not contain enough evidence on the issue of intent to convict Reddix of the substantive offense of murder. We do not agree. The state produced several witnesses

(Footnote 5 Continued)

> or an accomplice, in an attempt to commit the crime of robbery . . . your verdict shall be written on a separate piece of paper . . ..

who, if believe, established that Redix entered and then departed Art's Levi Store near the time the crime occurred. The state also produced the written confession of Reddix outlining the events occurring prior to, during, and after the robbery. [6] The

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[6] The confession, written in Reddix's own hand writing, said:

> I, Willie Reddix, was at my home on the 2nd of December, 1974, and Larry Jones was at my home. Larry also known as Catfish. J. D. Reddix was not there at the time. He did not know anything about the plan that Larry and I had in mind. When J. D. came home, we asked him to give us a ride uptown. He took us uptown and parked in the lot behind the place that used to be Brandley's Cleaners. Larry Jones and I got out of the car, but my brother, J. D. Reddix, did not get out of the car. This was about 10:45 a.m. Larry and I walked uptown for about five or ten minutes. Then I, Willie Reddix, went into Art's Levi Store, and I began to question the man about a coat. He showed me a couple of coats, and he had his back turned to the door. About this time, Larry Jones came in the store. I kept talking to the man to keep him from seeing Larry. For about the next three seconds, Larry hit the man about three times with a Stilson wrench. Then I ran to the door to keep a

(Footnote 6 Continued)

watchout. I had no idea that the man was dead. Larry drug the man into the office. We gathered all the goodies. Larry took shirts and pants and hats and put them in a footlocker. I was at the door watching all the time. Larry said, " can't get the cash register open," so I opened it for him. At this time I when in the office to see was Mr. Art dead, but he was still breathing, so I put his coat under his head, and then we left the scene. Larry carried the footlocker out of the store. Larry went to the left, on Croesus Street, and I went east on Howard Avenue. I was carrying a black jacket in my hand which I had took from the store. He met back at the car. J.D. was still in the car. Larry put the footlocker in the back seat of the car and he sat in the back seat. I got in the front seat. I gave the jacket to J.D. and told him, "Here is a jacket." J. D. did not ask us where we had been or where we got the tings from. The only thing he said was, "What you all got?" and I told him to just drive. We went home and parked the car in front of my house and Larry took the footlocker into my house. When I opened the cash register, we both took the money out. I got about fifty dollars, and I got one silver dollar. After we got home, we laid low for the rest of the day. All J. D. got was the coat

confession specifically referred to a "plan" that he and Larry Jones contrived for their criminal venture. The confession establishes that Reddix was fully involved in the commission of the felony of reobbery when the murder occurred. Reddix's confession also shows that he deliberately attracted Weinberger's attention so that Jones could sneak behind him and bludgeon his skull with a wrench. Finally, it indicates that Reddix must have observed each blow of this murderous assault and said or did nothing to stop his accomplice in crime from the deadly assault. Certainly, under the law of accomplice liability and based on the evidence in this record, a reasonable jury could conclude that Reddix was guilty beyond a reasonable doubt of the substantive offense of murder during the

(Footnote 6 Continued)

> I gave him. We did not tell him what we had one. The gun was not used in the holdup that Larry had, just the Stilson wrench.
>
> (Punctuation added.)

commission if the crime of robbery. As explained previously, Enmund does not affect the substantive criminal law of accomplice liability. Consequently, we reverse the district court's order insofar as it relates to Reddix's guilt or innocence of the substantive offense. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

IV.

The district court in its first order considered all of the arguments Reddix raised attacking the constitutionality of his conviction of the substantive offense. The court issued a detailed and lengthy opinion addressing each if them, and denied the relief requested. In granting habeas relief upon Motion to Reconsideration, however, the district court vacated its prior order in toto. We therefore remand this case to the

district court for reentry of its first order, either in its original form or with such modifications as are appropriate in light of this opinion. We vacate the district court's order granting Reddix's writ of habeas corpus and direct it to issue an order granting the writ of habeas corpus unless, within a reasonable time, the State of Mississippi conducts another sentencing hearing in the manner provided by Mississippi law and not inconsistent with this opinion. The state, of course, also has the option of vacating Reddix's death sentence and imposing a sentence less than death in accordance with state laws. [7]

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[7] See Bell v. Watkins, 692 F.2d at 1014 and Miss. Code Ann. § 99-19-107 (Supp. 1983). As we have noted, the district court remand will enter an order addressing all of the claims, such as admissibility of the confession, that Reddix raised in his petition. If either party appeals that order the state need not hold another sentencing hearing or otherwise resentence Reddix until this

Insofar as the district court's order freed Reddix because he already had served enough time for the crime of robbery, the order clearly was not within the power of the district court. Reddix has not been accused or convicted of robbery. The state has the right to hold Reddix pending the outcome of resentencing proceedings.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

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(Footnote 7 Continued)

> court renders a final decision in that appeal. All issues affecting the admissibility or nonadmissibility of evidence in either a resentencing hearing or any other proceeding which may become necessary in this case should be resolved before the state fulfills its obligations under the order issued on remand pursuant to this opinion. We make this provision allowing the state to postpone its obligation in the interest of judicial economy, and because of the peculiar procedural posture of this case.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. S81-0146(C)

WILLIE N. REDDIX — PETITIONER

V.

MORRIS THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS; EDDIE LUCAS, WARDEN, MISSISSIPPI STATE PENITENTIARY — RESPONDENTS

The petitioner here seeks a writ of habeas corpus to remove him from death row in the state penitentiary at Parchman. This young man has been sentenced to die by the state court and such decision has been affirmed twice by the Supreme Court of Mississippi. That petition for the writ of habeas corpus was finally dismissed by this Court on November 10, 1982 after a very elaborate and extended discussion of the course which this action has taken both in the state trial court and in the

Supreme Court of Mississippi and when certiorari was previously denied by the Supreme Court of the United States.

This death action has bothered this Court very extensively and has resulted in the Court requesting a transcript of the testimony in the state court. The Court noted that the petitioner was literally guilty as properly found by the jury of engaging the attention of the victim who had his back to the robber who struck him three times on the back of the head with a stillson wrench which resulted in his death shortly thereafter. Reddix entered the store with his accomplice when both were unarmed and neither of them had any intention of killing the victim.

This case has been handled in a very abstract way with absolutley no assistant, or cooperation from Reddix's New York lawyers. The facts in this case are that a human life is

at stake and at the moment hangs in the balance for an act which the Court seriously questions on personal research can be justified in spite of the loose wording of the statutory scheme of capital murder in Mississippi. Section 97-3-19, Mississippi Code 1972 passed on April 23, 1974 provides: "(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases: (e) When done with or without any design to effect death by any person engaged in the commission of the crime or * * * robbery, or in any attempt to commit such felonies." Irrefragably this storekeeper in Biloxi was unlawfully killed in connection with the robbery of his store; and the petitioner was undeniably present when this victim was killed by one of these two young black men. Reddix never had any plan, or purpose, or intent to kill this elderly white

man. Reddix never struck the fatal blow, or any blow which resulted in the death of this victim. Reddix never had possession of this stillson wrench, or any other dangerous tool when these two robbers entered this store in Biloxi about 10:45 a.m., December 2, 1974 and when Reddix's companion, Larry Jones, murdered Arthur Weinberger during the course of this robbery. Petitioner was properly given his Miranda rights on every occasion, but he nevertheless wrote out in his own long hand on December 16, 1974 a statement which showed that at most Reddix was present when this storekeeper was robbed and when he was fatally wounded by Larry Jones. Indeed, Willie N. Reddix was not by any means, or in any manner innocent of this crime of robbery of this store. Reddix took $50, plus $1.00 from the cash register, and took a coat from the store which he gave to his brother, but that is a far

cry for any action which called for his execution in the gas chamber at Parchman.

A careful search and close examination and consideration of all of the facts and circumstances simply leaves this Court in serious doubt that Willie N. Reddix did anything on this occasion which entitled the state of Mississippi to execute him for capital murder in spite of the statute, and particularly § 97-3-21 which provides among other things: "* * * Every person who shall be convicted of capital murder shall be sentenced to death or to imprisonment for life in the state penitentiary."

On February 29, 1892 the Supreme Court of the United States unanimously held in Rector of Holy Trinity Church v. United States, 143 U.S. 457, 12 S.Ct. 511: "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not

within its spirit nor within the intention of its makers." That announcement was again approved by the Court in the recent case of National Woodwork Manufacturers Association v. National Labor Relations Board, 386 U.S. 612, 87 S.Ct. 1250. Reddix never had any part, directly or indirectly, in striking this victim and never had any intention or plan to participate in striking Arthur Weinberger. The trouble with this statute which has occasioned this very lengthy record is occasioned by § 97-3-19(2)(e) which seems to make it unnecessary that there be any design or intention to effect death if done in connection with a robbery or in any attempt to commit such offense. The serious question at the very outset is as to whether or not intent is a necessary ingredient of capital murder. The statute seems to dispense with the necessity for such proof. In Earl Enmund v. Florida, 102

S.Ct. 3368 Mr. Justice White said that the question before the court in that case was: "Whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life or intended to take life." The Court there said: "We have concluded that imposition of the death penalty in those circumstances is inconsistent with the Eighth and Fourteenth Amendments." The decision of the Court in Enmund was accordingly reversed and remanded. Mr. Justice Brennan concurred with that opinion. Mrs. Justice O'Connor, the Chief Justice, Mr. Justice Powell and Justice Rehnquiest each dissented. That decision weighs very heavily upon the validity of the Mississippi statute and the consequent validity of Willie N. Reddix's sentence.

It is probable that this Court now does not have jurisdiction of this case because an

appeal was taken to the United States Court of Appeals for the Fifth Circuit on a prior date, but if the record can be recovered from the Fifth Circuit with their approval, I will be very happy to express my present views about this case in the light of subsequent developments.

This Court now finds as a fact and adjudicates as a matter of law:

(1) That the State of Mississippi as a sovereign state of the American Union has the unqestionable right to define the penalty for the crime of capital murder within the framework of the United States Constitution.

(2) That all of the state judges who have had any part or participation, directly or indirectly, in the trial and disposition of the case against Willie N. Reddix have executed with their utmost skill as lawyers and have applied their knowledge and ability in the

utmost good faith and best of their conscience and integrity to the task of giving Willie N. Reddix a perfectly fair and impartial trial in their handling of this case todate.

(3) That in Earl Enmund v. Florida, supra, the Supreme Court of the United States disapproved the death penalty in a capital murder case as impinging upon the Eighth and Fourteenth Amendments of the Constitution in a case where the criminal neither took life, attempted to take life, or intended to take life in that case. This is exactly that kind of case where Willie N. Reddix, in the middle of the morning at 10:45 A.M. on December 2, 1974 in company with another, robbed this store with no proof, or showing of any kind except by bold inference of his intent or preparation to kill this elderly white storeowner. Reddix was unarmed and had no dangerous or lethal weapon

of any kind in his hands or in his possession or within his reach on this occasion.

(4) Under such facts and circumstances Reddix has been adjudged guilty of capital murder and ordered to pay the death penalty in the gas chamber at Parchman simply because he was present when his companion (Jones) murdered Weinberger with a stillson wrench on December 2, 1974. Reddix has been on death row in the penitentiary at Parchman since the date of that crime. Nobody in the vast acquaintance of this Court who had anything to do with this Reddix case is so sanguine and so unscrupulous and so corrupt as to employ any strategy to execute this storerobber, except in strict accordance with every right of this criminal under our federal constitution.

It is my considered view under all of the facts and circumstances stated that Willie N. Reddix is justly and legally entitled to have a

writ of habeas corpus immediately issued from this Court to him; and that he is justly and legally entitled to be set free of his restraint because he has served as much as, or more than any court could properly or fairly impose upon him for the commission of this crime of robbery which netted him $51.00, plus an imitation leather coat.

It is ordered that petitioner's motion to reconsider my former order in this matter and that order to reconsider is sustained, and the previous order mentioned is withdrawn and vacated; that this Court now orders that a writ of habeas corpus issue from this Court to the warden of the state penitentiary at Parchman, and the Governor and the Attorney General of the state of Mississippi are ordered that they desist from the further detention of Willie N. Reddix, and he is ordered immediately liberated from the control of the custody of the officers

of the state of Mississippi, and the judgments of the state court which order the execution of Willie N. Reddix as a capital murderer is vacated and set aside and such state officers shall immediately free Willie N. Reddix from custody since he has been sufficiently punished for the crime of robbery which he conducted on December 2, 1974 in Jackson County, Mississippi, and this writ shall be their warrant therefor.

ORDERED AND ADJUDGED this January 20, A.D., 1983.

/S/ HAROLD COX
UNITED STATES DISTRICT JUDGE

WILLIE N. REDDIX

v.

STATE OF MISSISSIPPI

NO. 50999

SUPREME COURT OF MISSISSIPPI

FEB. 13, 1980

Defendant was convicted before the Circuit Court, Harrison County, Jack B. Weldy, J., of capital murder and was sentenced to death, and he appeled. The Supreme Court, Cofer, J., held that: (1) even if certain court decisions and statutes had resulted in vagueness and lack of clarity in regard to rights of defendants to prove mitigating circumstances, defendant could not complain in light of trial court's sentencing instruction permitting consideration of certain factors as mitigating circumstances; (2) evidence supported finding that defendant's confession was voluntary; (3)

defendant could not assert that admission of testimony in regard to wrench used in the murder was error where evidence in regard to wrench was first interjected into the record by defendant; (4) admission of evidence of defendant's convictions occurring subsequent to murder offense as evidence of aggravating circumstances was not error; (5) trial court did not err in giving certain instructions on mitigating circumstances; (6) death penalty was not shown to have been imposed under influence of passion, prejudice or other arbitrary factors; and (7) the death sentence was not disproportionate to penalty imposed in similar cases.

Affirmed.

1. Homicide 354

Even if certain court decisions and statutes had resulted in vagueness and lack of clarity in regard to rights of defendants to

prove mitigating circumstances during sentencing phase of capital cases, a defendant, who was convicted of capital murder and was sentenced to death could not complain in regard to such vagueness and lack of clarity, in light of fact that sentencing instruction permitted consideration of age of defendant at time of crime, any mitigating circumstances or combination of mitigating circumstances surrounding his life and character and any mitigating circumstances or combinations of mitigating circumstances surrounding commission of the offense. Code 1972, §§ 97-3-19(2)(e), 99-19-101, 99-19-103.

2. Criminal Law 531(3)

In proceeding in which defendant was convicted of capital murder and was sentenced to death, evidence did not warrant a conclusion that defendant's concern about his brother was used by officers to overreach defendant and

lead him to an involuntary confession, but, rather, the evidence supported the finding that confession was voluntary. Code 1972, § 97-3-19(2)(e).

3. Criminal Law 1037.2

Refusal to sustain motion for mistrial due to prosecuting attorney's references to a prior trial of defendant involved no error in criminal proceeding where defendant did not request that jury be instructed to disregard the testimony after overruling of the motion and renewed motion.

4. Criminal Law 1137(5)

Defendant, who was convicted of capital murder, could not assert that admission of testimony in regard to wrench used in the murder was error where the matter of the location of wrench and its identification as having been used in robbery were matters

injected into the record by defendant on cross-examination. Code 1972, §§ 97-3-19(2)(e), 99-19-101, 99-19-103.

5. Homicide 354

In proceeding in which defendant was convicted of capital murder and was sentenced to death, admission of evidence of defendant's convictions, which occurred subsequent to the murder offense, as evidence of an aggravating circumstance was not error. Code 1972, §§ 97-3-19(2)(e), 99-19-101(5)(b).

6. Criminal Law 814(3)
Homicide 311

In proceeding in which defendant was convicted of capital murder and was sentenced to death, trial court did not err in instructing jury that any mitigating circumstances or combination of mitigating circumstances surrounding defendant's life and character and surrounding the commission of the

offense with which he was charged were for jury's consideration; giving unrequested instructions that it would be a mitigating circumstance if defendant had no specific intent to cause death of victim and if defendant was an accomplice whose participation was relatively minor would have been improper, in that they would have been contrary to the proof. Code 1972, §§ 97-3-19(2)(e), 99-19-101.

7. Criminal Law 1038.3

Court cannot be put in error for failure to instruct if there had been no request for the instruction.

8. Homicide 354

Death penalty imposed against defendant, who was convicted of capital murder, was not shown to have been imposed under influence of passion, prejudice or other arbitrary factors, tough the same jury, which, at guilt phase of

the trial, had seen photographs of victim and heard testimony in regard to victim's wounds and wrench used in the offense, was used during the sentencing hearing. Code 1972, §§ 97-3-19(2)(e), 99-19-105.

9. Criminal Law 1206(2)

Death sentence for capital murder offense committed during robbery by defendant, who had been previously convicted of felony involving use or threat of violence to a person, was not disproportionate to penalty imposed in similar cases, even though defendant was only 18 years of age at time of the murder offense and even if he did not have any design to effect victim's death during the robbery. Code 1972, §§ 99-19-101(1), 99-19-105.

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Hawkins & Henry, Joe Ben Hawkins, W. Eugene Henry, Biloxi, J. W. Miller, Rolling Fork, for appellant.

A. F. Summer, Atty. Gen. by Marvin L. White, Sp. Asst. Atty. Gen., Jackson, for appellee.

Before the Court En Banc.

COFER, Justice, for the Court.

Appellant Willie N. Reddix, Larry Jones (Jones), and John Durango Reddix, Reddix' brother (J. D.) were indicted at the February 1975 term of Circuit Court of the Second Judicial District of Harrison County, of the capital murder of Arthur Weinberger, on December 2, 1974, then the owner and operator of "Art's Levis" (Art's) on Howard Avenue in Biloxi. The indictment charged that the crime was that denounced in Mississippi Code Annotated, Section 97-3-19(2)(e), (Supp. 1979), which defines capital murder in this case in the following language:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> * * * * * *

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies.

Appellant was tried on this indictment in 1975, and was convicted and sentenced to suffer the death penalty. He was eighteen years old at the occurrence. Heeding the shadows on the validity of our statutes on capital punishment as cast in Gregg v. Georgia, 428 U.S. 153, 95 S.Ct. 2909, 49 L.Ed.2d 859 (1976), this Court rendered its opinion in Jackson v. State, 337 So.2d 1242 (Miss. 1976), holding all persons under death sentence prior to the Jackson decision must be retried, and setting out guidelines herefor, including the holding of bifurcated trials, one on guilt of the indictee, and, if found guilty, another on the sentence to be imposed.

Under the Jackson case, the 1975 conviction of Reddix was reversed, by an unpublished opinion on March 2, 1977, and remanded for new trial. 342 So.2d 1306 (Miss. 1977).

The cause went to trial again in December 1977 being tried in the two phases, resulting in conviction of capital murder and death sentence, and the case is now again before us.

The proof in the case is largely undisputed, but will be noticed here in appropriate detail.

During the later morning of December 2, 1974, Ovell McGee was engaged in a landscaping tractor-driving operation beside a mall on Magnolia Street, near a parking lot, to the south of Howard Street in Biloxi. He testified that a white Cadillac automobile occupied by three black males was driven into the parking lot. Two of the three occupants emerged from

the vehicle, and went north along Magnolia Street to Howard Avenue, almost a block away. The third occupant, the driver, stayed in the car which remained parked there until the two others returned about twenty-five to thirty minutes later, one approaching from one way, carrying a footlocker, and wearing ragged-topped combat boots; the other one had a leather jacket coat on his shoulder when he returned. The bearer of the footlocker put it in the car, the two of them got in the car, and they drove away.

Raumond Real was employed in a jewelry store a few doors from Art's on Howard Avenue, and was returning from lunch, when he observed a balck may carrying a footlocker, handling it as if it were heavy; the man turned left (southeast) off Howard on to Reynoir; Real drove around to park his automobile, and came

across the man in an alley still with the footlocker.

Preston Sullivan had testified in the first trial, reversed and remanded, as above shown, but had become deceased since. His earlier testimony was read into the record [Miss. Code Annotated, section 13-1-111 (1972)], wherein he said he had been in Art's before December 2, 1974, and went in it about 11:30 a. m. on that date, and as he was approaching the store, he observed on the street a black man, wearing a watchcap, and having a navy peacoat slung over his shoulder, and wearing army fatigue trousers. He entered the store and saw Arthur Weinberger lying in a doorway to an office; he was lying on his back; and there was blood in a puddle around his head. The witness went to another place of business and caused the police to be called; then, thinking of the man dressed as above

coming out of the store, he went back across the street and all he could see "was that little green cap just for a second and then it disappeared."

Dr. Bazzone, a neurological surgeon, testified to the victim's condition when he had been brought to a hospital emergency room, a bruise over his eye, about four crossshaped wounds on the left side of the back of his head, some bone fracture, and appeared to be alive but unconscious. The hospital record showed the victim was seventy-seven years old. It was the physician's medical opinion that the victim had died from head injuries which caused damage to his brain resulting in his decease. The victim died at 4:36 p.m. that day.

Having obtained a search warrant therefor, Robert Payne, in charge of the criminal investigation division of the Biloxi Police Department, searched the home of Annie Lee

Reddix, appellant's mother, where appellant and J. D. also resided, and found a locked footlocker with merchandise in it, and also a pair of combat boots with ragged or fringed tops on them. On these boots were stains that appeared to be blood spots. Mrs. Lerline Blanq, on, and for three or more years preceding, December 2, 1974, was manager of Art's Levis Store, and possessing a very high degree of familiarity with the store's merchandise, returned to the store on that day, after her lunch break, about twelve noon, found the store and merchandise in a state of disarray, and the victim beaten and bleeding. She examined the footlocker and merchandise in it, when it had been taken on the search warrant, and identified them as having been taken from Art's; she testified to money on hand, in process of being prepared for deposit

when she left for lunch, and its not being there when she returned.

Lula Bell, aunt of appellant, had testified for the state in the earlier reversed trial, as well as several other times in hearings on this case and its companion case or cases. When called as a witness, she undertook to invoked the protection of the Fifth Amendment to the United States Constitution. Out of the presence of the jury, the state went over her former testimony and was met with denials or failure of memory as to her earlier proof. She was held by the court to be a hostile witness, whereupon her testimony was largely a confrontation with her answers in the earlier record. She had known appellant all his life; knew J.D.; had seen Larry Jones, the third co-indictee, about three times; she did not know where Art's Levis was located except that it was on Howard Avenue; and she had known

the victim for a number of years and had traded with him. She was in the area of the store the morning of December 2, 1974, but did not remember saying it was between nine-thirty and ten a.m., nor that her first stop was Betty Gary's, a store across the street near Art's; nor that she entered that store by the side entrance. She did not remember how long she was in Penney's; but she came out on Howard Avenue; she did not remember having testified that she saw appellant when she came out of Penney's or that he was running east pretty fast on Howard Avenue, on the side where Art's was located, or that he had a dark coat on his shoulder. She did not remember her earlier testimony that there was no doubt in her mind about it being appellant whom she saw.

Appellant's confession signed by him, subject of one of the assignments of error, was admitted into evidence, as follows:

I, Willie Reddix, was at my home on the 2nd of December, 1974, and Larry Jones was at my home. Larry is also known as Catfish. J. D. Reddix was not there at this time. He did not know anything about the plan that Larry and I had in mind. When J. D. came home, we asked him to give us a ride uptown. He took us uptown and parked in the lot behind the place that used to be Bradley's Cleaners. Larry Jones and I got out of the car, but my brother, J. D. Reddix, did not get out of the car. This was about 10:45 a.m. Larry and I walked uptown for about five or ten minutes. Then I, Willie Reddix, went into Art's Levi Store, and I began to question the man about a coat. He showed me a couple of coats, and he had his back turned to the door. About this time, Larry Jones, came in the store. I kept talking to the man to keep him from seeing Larry. For about the next three seconds, Larry hit the man about three times with a Stilson wrench. Then I ran to the door to keep a watchout. I had no idea that the man was dead. Larry drug the man into the office. We gathered all the goodies. Larry took shirts and pants and hats and put them in a footlocker. I was at the door watching all the

time. Larry said, "I can't get the cash register open." So I opened it for him. At this time I went in the office to see was Mr. Art dead, but he was still breathing, so I put his coat under his head, and then we left the scene. Larry carried the footlocker out of the store. Larry went to the left, on Croesus Street, and I went east on Howard Avenue. I was carrying a black jacket in my hand which I had took from the store. We met back at the car. J. D. was still in the car. Larry put the footlocker in the backseat of the car and he sat in the back seat. I got in the front seat. I gave the jacket to J. D. and told him, "Here is a jacket." J. D. did not ask us where we had been or where we got the things from. The only thing he said was "What you all got?" and I told him to just drive. We went home and parked the car in front of my house, and Larry took the footlocker into my house. When I opened the cash register, we both took the money out. I got about fifty dollars, and I got one silver dollar. After we got home, we laid low for the rest of the day. All J. D. got was the coat I gave him. We did not tell him what we had done. The gun was not used in the holdup that Larry had, just the Stilson wrench.

We now reach the assignments of error. They are:

I.

THE PROCEEDING UNDER WHICH THE APPELLANT WAS TRIED CONSTITUTE A VIOLATION OF THE UNITED STATES CONSTITUTION.

II.

THE TRIAL COURT ERRED BY FAILING TO SUSTAIN THE APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION.

III.

THE TRIAL COURT ERRED BY FAILING TO SUSTAIN THE APPELLANT'S MOTION FOR A MISTRIAL FOR REFERENCES MADE BY THE PROSECUTING ATTORNEY TO A PREVIOUS TRIAL OF THE DEFENDANT.

IV.

THE COURT ERRED BY ALLOWING INTO EVIDENCE TESTIMONY OF A WRENCH RECOVERED BY OFFICER TICHELL.

V.

THE STATE SHOULD NOT HAVE BEEN ALLOWED TO PRESENT EVIDENCE OF CONVICTIONS THAT OCCURRED

SUBSEQUENT TO THE OFFENSE FOR WHICH THE APELLANT WAS ON TRIAL.

VI.

STATE'S INSTRUCTION NO. 3 SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY.

VII.

THE DEATH PENALTY WAS IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE OR OTHER ARBITRARY FACTORS.

VIII.

THE SENTENCE OF DEATH IS EXCESSIVE AND DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES, CONSIDERING BOTH THE CRIME AND THE APPELLANT.

[1] Appellant maintains that "the proceedings under which the appellant was tried constitute a violation of the United States Constitution."

This argument has been made in multiple cases and found to be without merit. Irving v. State, 361 So.2d 1360 (Miss. 1978); Washington v. State, 361 So.2d 61 (Miss. 1978); Bell v. State, 360 So.2d 1206 (Miss. 1978).

The assignment brings into review the entire trial procedure and we are to notice the sentencing phase, also, in disposing of the assignment.

What appellant perceives to be an apparent conflict between the Jackson decision, supra, and Mississippi Code Annotated, Section 99-19-101 and 99-19-103 (Supp. 1978), is used as basis for confusion as to rights of defendants to prove mitigating circumstances. The Jackson decision says, in part:

> At this hearing, [the sentencing phase] the defendant may prove his lack of a prior criminal record as a mitigating circumstance and may also adduce proof of any other circumstance or combination of circumstances surrounding his life and character or the commissioner of the offence with which he is charged that would be reasonably relevant to the question of whether he should suffer death or be sentenced to life in prison.
>
> (337 So.2d at 1256).

On April 13, 1977, Sections 99-19-101 and 99-19-103 took effect. Section 99-19-101 provides, as to the sentencing phase:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to an of the aggravating or mitigating circumstances. . . .
>
> [and]
>
> (6) Mitigating circumstances shall be the following:
>
> (a) The defendant has no significant history of prior criminal activity.
>
> (b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (c) The victim was a participant in the defendant's conduct or consented to the act.
>
> (d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Appellant points further to the fact that after the Jackson decision and the effective date of Sections 99-19-101 and 99-19-103, (April 13, 1977), and just before he was put to trial again after reversal, the decision in Gray v. State, 351 So.2d 1342 (Miss. 1977), was rendered wherein note was taken of the new statutes, and the Court said that "[j]uries shall be instructed in accordance with the statute in all trials after April 13, 1977, the effective date of the statute." (351 So.2d at 1349).

He says that "the last sentence gave the new statute retroactive effect forcing the trial court not only to apply the vague directions of Jackson, but also the provisions of the new statute. The effect of this was to remove from consideration of the jury and to disallow the court to instruct the jury regarding several mitigating factors which might have been permissible under the Jackson decision."

In the Washington case above, 361 So.2d 61, 68 (Miss. 1978), this Court declared itself to be "committed to the 'individualized consideration of mitigating factors' in each case, and that the only limitation placed on the introduction of evidence of mitigating circumstances is that it must be easonably relevant." (Emphasis already there.)

Even if the Jackson decision were vauge and unclear, and even if the statutes and the

Gray decision above tend further to make for vagueness and lack of clarity, neither of which we find to be true, we are of the view that appellant may not complain, for he was given instructions liberally extending to him the benefit of these factors as mitigating circumstances in the state's own sentencing instruction:

> (1) The age of the defendant at the time of the crime.
>
> (2) Any mitigating circumstances or combination of mitigating circumstances surrounding his life and character.
>
> (3) Any mitigating circumstances or combination of mitigating circumstances surrounding the commission of the offense with which he is charged.

What circumstances appellant would have had the jury consider do not appear. As argued by the state, under the mitigating principles

in the instruction granted, appellant could have presented evidence of lack of murder intention on his part.

We will examine the mitigating circumstances to which testimony was given hereinafter.

Appellant cites and urges the weight of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), but we distinguished it in Washington v. State, supra.

In addition to what we have said, effort has been made in several of our decisions under the statute here controlling to procure review by the United States Supreme Court, only to have certiorari denied by that Court.

[2] Appellant's second assignment of error attacks the trial court's failure to sustain his motion to suppress his confession.

The crime of which appellant was accused took place on December 2, 1974. About the

tenth of December 1974, appellant was in the Jackson County Jail on other charges, and had given a fictitious name. How it was discovered is not clear from the record, but, about that date, Captain Florian Tichell of the Biloxi Police Department, investigating the Art's crime, accompanied by Sergeant Chester of the Biloxi Police Department, went to the Jackson County Jail at Pascagoula, and talked to appellant about the Art's case, asking him if he was involved in the crime, telling him that J. D. was involved in it, and asking him if he knew anything about it, which he denied. After about a half-hour conversation, the officers left.

On December 14, 1974, Tichell and Officers Chester and Hamilton brought appellant from the Jackson County Jail to the Biloxi Jail. Tichell booked him. During this contact and journey, Art's case was not discussed with

appellant. On December 15, 1974, Tichell asked him for a statement and he told Tichell that, if he had anything to tell him, he would do so the next morning.

On the morning of December 16, 1974, the appellant executed a written waiver of his Miranda rights:

CONSENT TO SPEAK AND
WAIVER OF RIGHTS

> I, Willie Reddix, Age 18, Date of Birth 7/30/74 [sic] residing at 467 East Divison St. in the City of Biloxi state of Miss. have read this statement of my rights/have had my rights read to me by Capt. Tichell who has identified himself to me as a member of the Biloxi Police Department. I understand what my rights are and I am willing to make a statement and answer questions. I do not want a lawyer at this time, I understand and I know what I am doing. No threats or promises have been made to me, and no pressure or coercion of any kind has been used against me.
> SIGNATURE: /s/ Willie Reddix Date: 7/16/74 Time: 11:32 A.M. Place: Biloxi Police Department

He, thereupon, gave and signed the confession quoted at length hereinabove at the beginning of which appears the following:

> Willie N. Reddix, of the age of 18, residing at 467 East Davison St., City of Biloxi, County of Harrison, State of Miss., have been advised of my rights by Capt. Tichell, of the Biloxi Police Department as follows: Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer. If you cannot afford a lawyer, one will be appointed for you at no expense to you. If you wish to answer questions now, without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer. I have further been warned and advised that I do not have to make a statement of any kind or character whatsoever, nor do I have to incriminate myself in

any way. Further, I have been advised that in the event I do make a statement that the same may be sued against me in any court.

After being so advised and cautioned, I do hereby expressly waive my rights to counsel and his advice, and do hereby make the following voluntary statement, freely, without any fear or threat having been made to me, and without any promises of reward of any kind and with the knowledge that this statement that I now make may be used against me on any trial or trials for the offense or offenses concerning the matter which the following voluntary statement is made; that as stated, this statement is made of my own free will without any promise of reward, without any fear or threat of any kind having been made to me, and without any coercion, and without any leniency or offer of leniency being made to me by any person whomsoever.

* * * * * *

I further state that I have read this entire statement, initialed all corrections, and signed this statement in the presence of the below listed witnesses, and that it is correct and true as written.

/s/ Florian Tichell
(Signature)
Capt. Biloxi Police
(Title and/or Address)
/s/ Charles Kriss
(Signature)
Major B. P. D.
(Title and/or Address)

/s/ Willie Reddix
(Signature)
467 East Divison St.
(Address)

Following the preliminaries next above, Reddix made the statement hereinabove quoted, to Tichell alone. Appellant would not make any statement if a third person were present, and others were excluded from the conversation. The record is replete with evidence that he was given his Miranda rights on more than one occasion including this meeting wherein and just before the confession was made.

Appellant says the primary objection to the confession was that it was not free and voluntary because of fears and promises made to him. In the motion to suppress, he said there were no threats, promises, or duress, and Tichell testified to the same. Appellant said

Tichell "just told me that he would see what he could do for me," but he did not promise anything. He further testified that the only reason he gave the statement was to free J. D. from "a lie that they had put on him. He wasn't involved in it."

He testified that the officers told him J. D. was charged with capital murder, and they would put him in the gas chamber if found guilty. This testimony is contradicted. Tichell, in rebuttal, also gave evidence that he made no promises to appellant concerning appellant or J. D.

It seems apparent from the record that appellant was concerned about J. D. and what might happen to him, as well he should have been. The record will not support a conclusion that this earnest concern was used by the officers to overreach him and lead him to an

involuntary confession, or that it had that result.

The decision in Agee v. State, 185 So.2d 671 (Miss. 1966), collates certain rules relative to confessions and the taking and use of them.

> The State has the burden of proving the voluntariness of a confession. This burden is met by the testimony of an officer, or other person having knowledge of the facts, that the confession was voluntarily made without any threats, coercion, or offer of reward. This makes out a prima facie for the State on the question of voluntariness. Lee v. State, 236 Miss. 716, 112 So.2d 254 (1959). When objection is made to the introduction of the confession, the accused is entitled to a preliminary hearing on the question of the admissibility of the confession. This hearing is conducted in the absence of the jury. Lee v. State, supra, is also authority for the proposition that when, after the state has made out a prima facie case as to the voluntariness of the confession, the accused

> offers testimony that violence, threats of violence, or offers of reward induced the confession, then the State must offer all the officers who were present when the accused was questioned and when the confession was signed, or give an adequate reason for the absence of any such witness.
>
> See also Holmes v. State, 211 Miss. 436, 51 So.2d 755 (1951).

In Clemons v. State, 316 So.2d 252 (Miss. 1975), the rule was also stated:

> This conflicting evidence presented a question of fact to be determined by the trial judge who was in the best position to observe the witnesses as they testified. We have consistently held that where evidence is conflicting on the question of whether a confession was voluntarily made, that the issue is to be determined by the trial court, and upon review, this Court will not disturb the trial court's finding unless it appears to be contrary to the evidence. Ivey v. State, 246 Miss. 117, 149 So.2d 520 (1963).
>
> (316 So.2d at 253).

The rules from the Agee decision supra, were all met in the advance inquiry into the validity of the confession, and the trial judge resolved all conflicts in favor of the voluntariness and admissibility of it. We are of the view that his decision is supported by, and not contrary to, the evidence, and the assignment of error that the motion to suppress should have been sustained is not well taken.

[3] Appellant's third asserted error is in the trial court's failure to sustain his motion for a mistrial for references made by the proceduting attorney to a previous trial of the defendant. Lula Mae Bell, whose testimony has been hereinabove summarized, had testified in the earlier trial of appellant on this charge, reversal of which case has also been set out hereinabove. The witness, appellant's aunt, could not remember earlier testimony, after she had been found to be hostile to the

state. Using the record of her testimony in the first jury trial, the district attorney was cross examining her, in the course of which there was this exchange:

> Q. Do you remember, Mrs. Bell, my asking you if you saw Willie Reddix in the court room,. and you said, "Yes, I do, back on the date you testified here in March of 1975."
>
> A. I remember that.

Later there was this question or statement by the district attorney:

> Q. That's all I'm asking you. I know it's hard on you testifying against your nephew but you've done it before, and I'm just telling you to tell the truth.

At the first of these exchanges, appellant made a motion for mistrial, and at the last one, the motion was renewed, and when the

motion was overruled each time it was made, there was no request that the jury be instructed to disregard the testimony and therefore no error. Clanton v. State, 279 So.2d 599 (Miss. 1973).

Appellant relies upon Strong v. State, 199 Miss. 17, 23 So.2d 750 (1945). In that case the defendant had gone into testimony as to another case described as being that of a similar nature to the one on trial, and, as the district attorney was making his argument to the jury, the defendant objected, and the court, noting the defendant had opened the door to the argument, overruled the objection and instructed the jury to consider the present case on its own facts. Assigned as error on appeal, this Court said:

> As a general rule it is incompetent and improper to either prove the result of a former trial, or comment thereon, before the jury on a

> subsequent trial, and that for several obvious reasons . . . (citing authorities). But the question is whether it was reversible error, or error at all, under the peculiar circumstances, of this case. We do not think it was reversible error for these reasons: The question had been opened up and gone into by appellants. The exact status of that litigation was left up in the air before the jurors. It was before them that a former trial had been had on the same charge and the jurors, or some of them, might well have been confused as to how it affected their duties and powers.
>
> (199 Miss. 27, 23 So.2d at 752).

Miller Transporters, Ltd. v. Espey, 187 So.2d 876 (Miss. 1966), was a second trial after reversal in this Court. The mandate on that reversal was introduced in evidence. There was objection thereto and its introduction was assigned as error, on the ground that appellant's rights were prejudiced thereby. This Court disagreed because

appellant had "opened the door." We further observed, however:

> The general rule is that opinions and mandates of appellate courts are not proper evidence in the retrial of a cause of action. This is so because the opinion or mandate may advise the jury or comment upon the evidence. Strong v. State, 199 Miss. 17, 27, 23 So.2d 750 (1945); 88 C.J.S. Trial, § 179 at p. 349 (1955). However, in the instant case, the mandate does not review or comment on the evidence in the former trial, and under these circumstances, we cannot say that permitting the mandate to be shown to the jury requires a reversal in this case. Strong v. State, supra.
>
> (187 So.2d at 877).

We fail to find error in this assignment. Having done so, the further observation is made that, although we know Harrison County is densely populated, highly progressive, and with many matters and activities occupying the minds of its people, we are unable to attribute to

the jury in this case a degree of naivete that would cause on its part an unawareness of the earlier trial, conviction, and reversal, but would know of it arising, if not earlier, from the voir dire testing of their qualifications to sit as jurors, and the fact that Lula May Bell had testified before in a case apparently with facts similar to these (although she was the state's first witness.)

[4] The fourth assignment of error arises from the court's allowing into evidence of testimony of a wrench recovered by Officer Tichell.

Appellant's confession, held hereinabove properly admitted in evidence, had shown Jones wielded a Stilson wrench in the murder of the victim. Tichell, who took the confession, was on cross examination, when these questions were asked and answered:

Q. And you would also agree that Willie told you that Larry hit the man three times with a Stilson wrench?

A. Yes, sir.

Q. That was what Willie told you on that date?

A. Yes, sir.

* * * * * *

Q. Willie also told you about a Stilson wrench, did he not?

A. Yes.

Q. Did you ask him any further questions about the Stilson wrench?

A. Not that day, no.

Q. Did you ask him on another occasion about the Stilson wrench?

A. Yes, after I recovered the wrench, I asked him about it.

Q. After you recovered the wrench?

A. Yes.

Q. Where did you recover the wrench?

A. I recovered the wrench from a Mr. Harris on Nixon Street.

Q. When did you recover that?

A. Oh, about maybe one day, maybe two days later.

Q. What did you ask Willie about the wrench?

A. When I recovered the wrench, I asked Willie was that the wrench. He identified that as being the wrench that was used.

BY MR. HENRY: We would ask that the jury be excused at this time.

The jury was excused, and there was further questioning, and discussion between counsel as to a stipulation earlier made which might keep the wrench (and the testimony about it) from being in this record. Thejury returned to the courtroom, and the state, on redirect, asked Tichell the question:

Q. What did the defendant tell you about the wrench?

A general objection was made by the appellant, which was sustained as to the form of the question. The wrench was made an exhibit for identification, and later an objection was sustained to the state's offer of it and some other exhibits already in the record for identification. Hence, it was never admitted into evidence.

From what we have just quoted and delineated from the record it is seen that the matter of the location of the wrench and its identification as being that used in the robbery were matters first injected into the record by appellant on cross examination, and whatever damage there was to appellant's defense was done, or largely done, by appellant. Without further citation of authority the Strong and Miller Transporter decisions supra are a complete answer to this

self-made error and the state did not cause it at all.

Appellee's brief quotes from State v. Apple, 121 N.C. 584, 28 S.E. 469, 470 (1897): "If the defendant goes fishing in the state's waters, he must take such fish as he catches."

We conclude that appellant may not assert this as error.

[5] Appellant assigns as his fifth error that the state should not have been allowed to present evidence of convictions that occurred subsequent to the offense for which the appellant was on trial.

The offense, the basis for the indictment herein, took place on December 2, 1974. In March 1975 appellant was convicted and sentenced in this case. An appeal was taken to this Court. On November 20, 1975, he entered pleas of guilty to two charges of armed robbery

and two charges of kidnapping in the Circuit Court of Jackson County. On March 2, 1977, this Court reversed the conviction and sentence in this cause, and remanded the cause for new trial. The new trial took place in December, 1977, and in that trial proof of his conviction on guilty pleas of armed robbery and kidnapping was introduced in evidence during the sentencing phase. Appellant objected to this proof "on grounds that these are offered under an ex post facto statute."

Section 99-19-101(5)(b) (1979 Supp.) lists as one of the limited number of aggravating circumstances which may be proven in the sentencing phase of a capital murder case,

> (b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

This question arose in the companion case of Jones v. State, 381 So.2d 983 (Miss. 1980), and it was there said:

> Another problem which deserves comment arose in the sentencing phase. The lower court admitted evidence of an armed robbery conviction of the appellant entered after the December 2, 1974, murder of Weinburger. This conviction was affirmed on appeal in a per curiam opinion. Jones v. State, 340 So.2d 17 (Miss. 1976).
>
> Among the aggravating circumstances available for consideration in capital cases under Mississippi Code Annotated section 99-19-101 (Supp. 1979), subsection (5)(b) is that: "The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person." (Emphasis added). In employing the word "previously", the statute designates no time frame. The question arises as to whether the legislature meant previous to the commission of the capital offense or previous to the trial for it.

We conclude the legislature intended to relate the word "previously" to the time of trial, so that a conviction between the time the capital offense was committed and the time of trial for it may be admitted into evidence as an aggravating circumstance. We think this, because a wide leeway is permitted the appellant to offer mitigating circumstances in avoidance of the death sentence, while an extremely limited type of behavior may be offered by the state in seeking capital punishment. In our opinion, the legislature undoubtedly intended a weighing of both at the time of sentencing so the past behavioral patterns likely to affect the defendant's future behavior might be evaluated by the jury in deciding whether the defendant will live or die. We think there is no more justification for terminating consideration of the defendant's criminal behavior at the time of the offense than there is for terminating consideration of favorable behavior at that time. All go to the question of whether the most severe punishment will serve a legitimate social purpose untainted by vindictiveness.

Thus, we have committed ourselves to a position contrary to appellant's present assertion of error.

[6] In the sixth place, appellant says state's instruction No. 3 (on the sentencing phase) should not have been submitted to the jury.

In the sentencing phase of the case, the state showed as aggravating circumstances two pleas of guilty and sentences on dictments charging appellant with kidnapping and two pleas of guilty and sentences on indictments charging appellant with armed robbery, all in the Circuit Court of Jackson County. (These, as shown hereinabove, were crimes committed after the fatal assault on the victim in this case.)

Following the proof by the state next above, appellant produced James Wren, the Harrison County Sheriff's jailer for the Second

District of that county, who testified that he had known appellant in the jail, and knew his general reputation for peace or violence and it was good. On cross examination, he said all he knew was what he had learned in six months of acquaintance with appellant from people in the jail, and that what he was saying was that appellant had not given him any trouble.

Appellant brought his mother to the stand, and she, Annie Lee Reddix, testified that he had gone to the eighth grade in school.

As his final witness in the sentencing phase, appellant brought Richard Spencer, Harrison County Deputy Sheriff, assigned to the Second District Jail at Biloxi, who testified that, as to appellant's reputation for peace or violence, some say one thing and others say another, but that they had no trouble with him at the jail.

On mitigating circumstances, two instructions were given, the appellant requesting none.

The burden of appellant's argument here is that the court should have given more precisely, and in more detail, mitigating circumstances and that there are degrees or various weights of circumstances, and that one circumstance may be sufficient to outweigh all opposing circumstances in the record. As we treated this instruction early in this opinion, the jury was much more favorably instructed than required under section 99-19-101. The jury was instructed that "any mitigating circumstances or combination of mitigating circumstances surrounding his life and character" and "any mitigating circumstances or combination of mitigating circumstances surrounding the commission of the offense with

which he is charged," were for its consideration.

Appellant maintains that there should have been spelled out as mitigating circumstances, for instance, that appellant had no specific intent to cause the death of the victim, but nobody said he did not, and the record shows he purposely diverted the victim's attention until his accomplice could deliver the fatal blows. He further argues that appellant was an accomplice whose participation was relatively minor, but this, too, is contrary to the proof which showed him on an equal footing with Jones in the crime.

In addition to the absence of a record supporting these asserted mitigating circumstances, appellant could have requested an instruction embodying them, and then, if refused, assigned the refusal as error.

[7] Under Newell v. State, 308 So.2d 71 (Miss. 1975), for failure to instruct without specific request therefore, the Court may not be put in error as here undertaken. Voyles v. State, 362 So.2d 1236 (Miss. 1978), certiorari denied, 441 U.S. 956, 99 S.Ct. 2184, 60 L.Ed.2d 1059 (1979); Washington v. State, 361 So.2d 61 (Miss. 1978); certiorari denied, 441 U.S. 916, 99 S.Ct. 2016, 60 L.Ed.2d 388 (1979); Irving v. State, 361 So.2d 1360 (Miss. 1978); certiorari denied, 441 U.S. 913, 99 S.Ct. 2014, 60 L.Ed.2d 386 (1979); Jordan v. State, 365 So.2d 1198 (Miss. 1979); certiorari denied, ___ U.S. _____, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979).

In the Lockett decision supra, appellant quotes in support of his thesis the following:

> We conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from

> considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. (Emphasis not by us).
>
> (438 U.S. at 604, 98 S.Ct. at 2965, 57 L.Ed.2d at 990).

We are of the view that the trial, including the instruction attacked, complied well with this requirement.

[8] The seventh assignment of error is that the death penalty was imposed under the influence of passion, prejudice or other arbitrary factors.

Basis for this assignment is threefold: (1) the gruesome pictures admitted in evidence; (2) Dr. Bazzone's description of the victim's wounds; and (3) the Stilson wrench testimony noticed in assignment of error No. 4 above.

Appellant cites no authority, but we notice his arguments nevertheless. In addition to citing no authority it is evident in the record that there was no objection to the pictures or to the physician's rather detailed description of the wounds, emergency treatment of them, and their being the cause of his death. Appellant also complains that Dr. Bazzone's testimony established the cause-of-death element of the corpus delicti.

We recognize that pictures can be gruesome and repelling. There comes to mind no picture portraying wounds such as here present that might be pleasantly attractive. We have consistently held that the competency, relevancy, and materiality of photographs are within the sound discretion of the trial judge, who also determine whether such pictures have legitimate evidentiary purpose or value. This holding extended to the death penalty cases of

Voyles v. State, supra, and Irving v. State, supra.

We have sufficiently dealt with, and disposed of, the Stilson wrench testimony, now here again argued.

It is argued, also, that the use of the same jury in both the guilt phase and the sentencing hearing was prejudicial to appellant, this jury, at the guilt stage, having heard Dr. Bazzone's testimony and the Stilson wrench evidence, and having seen the photographs of the victim. Section 99-19-101(1) provides for use of the same jury for both hearings, although it does not necessarily so mandate. There was no objection to this procedure nor was there request that another jury hear the sentencing case.

We find this assignment to be without merit.

[9] Appellant's eighth and final assignment is that the sentence of death is disproportionate to the penalty imposed in similar cases, considering both the crime and the appellant.

It was not necessary that appellant have any design to effect the victim's death, while appellant was engaged to the commission of the crime of robbery. He and Jones, his accomplice, had a plan for and in what they were about. It is argued that the record does not show what the plan was. The poet said that the best study of mankind is man, and Holy Writ says, "By their fruits ye shall know them." There is no showing in this record that anything unanticipated occurred, to throw them off balance or to change their course. Holding the victim's attention from Jones was as much a part of Jones' bludgeoning the victim as if

appellant had physically restrained him while his head was being crushed.

In Culberson v. State, 379 So.2d 499 (Miss. 1979), this Court unanimous in its decision of guilt, said:

> Presently, we can say without doubt the appellant schemed and participated in the unlawful undertaking which resulted in death. The subjunctive nature of the intention to kill makes it no less deliberate and no less deserving of capital punishment than if it had been expressed, in our opinion. The felon who causes death in furthering his crime manifests a callous disregard for human life, because he subordinates the life of the innocent to his desire for gain, thereby inviting the outrage of a society understandably bent upon protecting itself from physical violence.

Price v. State, 362 So.2d 204 (Miss. 1978), while it involved a party found guilty and sentenced to life imprisonment in a

bifurcated hearing in a capital murder case, states again the law in this way:

> It is also familiar law that when two or more persons act in concert, with a common design, in committing a crime of violence upon others, and a homicide committed by one of them is incident to the execution of the common design, both are criminally liable for the homicide. McNeer v. State, 228 Miss. 308, 87 So.2d 568 (1956). Teh fact that the accused did not fire the fatal shot does not relieve him from criminal responsibility for the death of Mrs. Green who was slain by the accused's confederate in carrying out the common design to rob. Carrol v. State, 183 Miss. 1, 183 So. 703 (1938).
>
> (362 So.2d at 205).

The Lockett case, supra, involved the conviction of a party to a murder in connection wtih a robbery. The convicted person was not in the shop when the shop owner was killed. The conviction was reversed, not because there was shown no intent on her part, but rather

because, in the opinion of the United States Supreme Court, the Ohio statute under which she was convicted improperly limited the permissible mitigating factors, not including defendant's minor role among the partners in the crime.

By mandate of the statute we have reviewed the following capital murder cases: Jones v. State, 381 So.2d 983 (Miss. 1980); (companion case to this one); Culberson v. State, 379 So.2d 499 (Miss. 1979); Gray v. State, 375 So.2d 994 (Miss. 1979); Jordan v. State, 365 So.2d 1198 (Miss. 1979); Voyles v. State, 362 So.2d 1236 (Miss. 1978); Price v. State, 362 So.2d 205 (Miss. 1978); Irving v. State, 361 So.2d 1360 (Miss. 1978); Washington v. State, 361 So.2d 61 (Miss. 1978); Bell v. State, 360 So.2d 1206 (Miss. 1978); Nealy v. State, 354 So.2d 78 (Miss. 1978); and Hill v. State, 339 So.2d 1382 (Miss. 1976). In these cases there

is no death sentence of one not physically acting or assisting in the killing, as is the situation here. Neither is it true that there was one planned and executed in more deliberate fashion than the one now before us.

In the companion case, Jones v. State, 381 So.2d 983 (Miss. 1980), the majority of this Court affirmed the death sentence and mandated its execution. An examination of the appeal record in that case reveals these differences between that case and this one:

(1) The district attorney's argument before the jury wherein he made a comment that probably bore upon appellant jones' failure to testify.

(2) The Jones jury, after 2 1/4 hours of deliberation, reported to the Court that it could not reach a unanimous verdict. "What shall we do?" Thereupon, the Court was recessed until the next morning.

(3) Jones was a borderline to mentally retarded man.

(4) There was no confession in that case.

(5) No eye witness testified in that case.

(6) J. D. (the co-indictee with this appellant and Jones), took a sentence for a lesser crime and for a shorter incarceration and was one of the main witnesses for the state.

These infirmities in the Jones trial are not present here, and we considered that guilt here present is much more strongly established here than in Jones' case.

Considering the crime and the appellant, we do not conclude that the death sentence is excessive and disproportionate to that imposed in similar cases.

Hence, we fail to find merit in any of the asserted errors.

Under Mississippi Code Annotated, section 99-19-105 (Supp. 1978), automatic appellate review of this case is necessary on our part, and we have reviewed the record on the errors assigned and in search of errors not assigned.

In doing so, we have considered the punishment prescribed by the sentencing phase jury, and have next above recorded our view and conclusions relative thereto. We find the death sentence not to have been imposed under the influence of passion, prejudice, or any other arbitrary factors; that the evidence supports the jury's finding that the aggravating circumstances are not outweighed by the mitigating circumstances, and that the death sentence is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

The jury's verdict signed by the foreman thereof is as follows:

> We the jury animously find from the evidence and beyond reasonable doubt that the capital murder in this case was committed while the defendant was engaged in the commission of the crime of robbery; that the capital offense was especially heinous, atrocious and cruel; and that the defendant has been previously convicted of a felony involving the use or threat of violence to the person. We further find unanimously from the evidence and beyond a reasonable doubt that after weighing mitigating circumstances and the aggravating circumstances, one against the other, that the mitigating circumstances do not outweigh the aggravating circumstances and that the defendant should suffer the penalty of death.

We affirm the conviction and sentence and set the 19th day of March, 1980 as the date for execution of the sentence.

AFFIRMED.

PATTERSON, C. J., SMITH, and ROBERTSON, P. JJ., and SUGG, WALKER, BROOM, LEE and BOWLING, JJ., concur.